LEGAL COMPANION.

Vol. IV. JANUARY, 1876. No. 1.

THE LAW AND CONSTITUTION OF BRITISH INDIA.

The acquisition of territory by the East India Company necessarily brought with it the obligation of providing for the security of person and property among those who had become subject to their rule: the local governments were accordingly authorized by Royal Charter in 1661, "to judge all persons belonging to the Governor and Company of the East Indies, or that should live under them, in all causes whether civil or criminal, according to the laws of the kingdom, and to execute judgment accordingly." Bengal Regulation IV. of 1793 prescribes "that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mohammadan laws with respect to Mahomedans, and the Hindu laws with regard to Hindus, shall be considered as the general rules by which the Judges are to form their decisions." This Regulation was subsequently extended to the Upper Provinces: it had been previously enacted at Madras: at Bombay, Regulation IV. of 1797 was if possible more comprehensive, securing to Hindu and Mahomedan defendants in civil suits the benefit of their own laws regarding "succession to and inheritance of landed and other property, mortgages, loans, bonds, securities, hire, wages, marriage, and caste, and every other claim to personal or real right and property so far as shall depend upon the point of law." These statutes and regulations have never been formally repealed, although of late years very important departures from them have been hazarded in regard to succession and marriages.—Both the Mahommadan and Hindu laws enumerate difference of religious faith as a bar to inheritance. In the Bengal Regulation V. of 1831, which relates chiefly to modes of procedure, a clause was inserted declaring that "the rules applicable to the observance of native laws in suits between natives previously enacted

were intended, and should be held, to apply to such persons only as should be *bonâ fide* professors of the Hindu and Mohammadan religions at the time of the application to the law of the case: wherefore when one of the parties shall not be either of Mohammadan or Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled"—or in other words, a convert to Christianity from Hinduism or Mohammadanism should not thereby incur the forfeiture to which the laws of those religions would subject him: a law which, however, reasonable and just, was undoubtedly the abrogation, as far as it went, of native law, and opposed to the faith and feelings of the people, as well as to the letter and spirit of all preceding regulations and statutes: the law was afterwards more explicitly defined and extended to the whole of British India by Act XXI. of 1850, which declares that, " so much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion (or being deprived of caste) shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the same territories." Another important innovation took place in 1856, when an Act was passed declaring that " no marriage between Hindus should be invalid, or the offspring illegitimate, on account of any previous marriage to a person deceased;" the object being to legalize the second marriage of Hindu widows, in contradiction to the usages and opinions of the Hindus."*

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them, not only the laws, but sovereignty of their own State, and those who live amongst them, and become members of their community, become also partakers of and subject to the same laws. But this was not the nature of the first settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards. If the settlement had been made in any Christian country of Europe, the settlers would have become

* *Vide* Introduction to the Principles of Hindu and Mohammadan Law, *by Macnaughten.*

subject to the laws of the country in which they settled. It is true that in India they retained their own laws for their own government, within the factories which they were permitted by the ruling powers of India to establish ; but this was not on the ground of general international law, or because the Crown of England had any proper authority in India, but upon the principles explained by Lord Stowell in a very celebrated and beautiful passage of his judgment in the case of the Indian Chiefs (3, Rob., 28). The laws and usages of eastern countries, where Christianity does not prevail, are so at variance with all the principles, feelings, and habits of European Christians, that they have usually been allowed, by the indulgence or weakness of the potentates of those countries, to retain the use of their own laws ; and their factories have, for many purposes, been treated as part of the territory of the sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to Natives within the same limits, who remain to all intents and purposes, subject of their own sovereign, and to whom European laws and usages are as little suited as the laws of the Mahomedans and Hindus are suited to Europeans. These principles are too clear to require any authority to support them, and they are recognized in the judgment above-mentioned. But if the English law were not applicable to Hindus on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration ? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remain unchanged. The English law, civil and criminal, has been usually considered to have been made applicable to Natives within the limits of Calcutta in the year 1726, by the Charter 13, Geo. I. Neither that nor the subsequent Charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them.*

The common law, the unwritten law and constitution of England had never been introduced into the Mofussil. The provinces of Bengal, Behar, and Orissa were countries, which at the time when they came into the possession of the English Government, had laws of their own, for the administration of which provision was made. When the East India Company took upon itself the office of Dewan, the 21st G. III. c. 70, s. 23, and the 37th G. III. c. 142 made provision for the introduc-

* *Vide* 1, W. R. (P. C.) p. 15.

tion of such changes in the ancient laws of the country as the Governor-General in Council might from time to time think fit to make. Express provisions against the introduction of English law, were made by Regulation III. of 1793 (See the preamble and Section 31, Regulation IV. of 1793, Sec. 15, and Regulation VII. of 1832, Sec. 9.)

By the 37th G. III. c. 142, s. 8 Parliament conferred on the Governor-General in Council a power of legislation concerning the rights, persons, and properties of the Natives amenable to the Provincial Courts without restriction or limitation of any kind.

The "Indian Councils' Act, 1861" (24th & 25th Vic. c. 67) was passed in order to consolidate and amend the provisions of former Acts of Parliament respecting the constitution and functions of the Council of the Governor-General of India, and to give power to the Governors in Council of the Presidencies of Fort St. George and Bombay to make laws and regulations for the Government of those Presidencies, and to enable the like legislative authority to be constituted in other parts of Her Majesty's Indian dominions.

The legislative powers of the Council of the Governor-General extend

(1) to repeal, amend or alter any laws or regulations in force in the British Territories in India;

(2) to make laws for all persons whether British or Native, foreigners or others, and for all Courts of Justice and for all places and things within those territories, and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty.

But it was expressly declared that that legislative authority should not extend to repeal or in any way affect any provisions of any Act of Parliament passed at any time after the year 1860 which in any wise affects Her Majesty's Indian territories or the inhabitants thereof. Nor does it extend to pass any law or regulation which may affect the authority of Parliament, or the constitution and rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories. And in particular the Council has no authority to repeal or affect by their legislation any of the provisions which, at the time of the passing of the Indian Councils' Act, remained in force of the Acts (3 & 4 William IV. Cap. 85; 16 & 17 Vic. Cap.

95; 17 & 18 Vic. Cap. 77; 21 & 22 Vic. Cap. 106, entitled "An Act for the better Government of India," and 22 & 23 Vic., Cap. 41, passed to amend the same.) It was provided that no law or regulation made by the Governor-General in Council should be deemed invalid by reason only that it affected the prerogative of the Crown.

By "The Indian Council's Act, 1861," *i. e.*, the 24 & 25 Vict., Cap. 67, the Governments of Bengal, Madras, and Bombay have each power, subject to certain restrictions, to pass Acts.

By Section 42 of the Act, the Governor in Council of each of the Presidencies of Madras and Bombay has power, at meetings for the purpose, to make laws and regulations for the peace and good government of such Presidency; and for that purpose to repeal and amend any laws and regulations made prior to the coming into operation of the Act by any authority in India, so far as they affect such Presidency; but he has not the power to make any laws or regulations which shall in any way affect any of the provisions of the Act, or of any other Act of Parliament in force, or that may hereafter be in force, in such Presidency; nor by Section 43 is it lawful for the Governor in Council of either Presidency, except with the sanction of the Governor-General, previously communicated to him, to make regulations or take into consideration any law or regulation for any of the following purposes, *viz.*:—

1.—Affecting the public debt of India, or the customs duties, or any other tax or duty in force at the time of the passing of the Act, and imposed by the authority of the Government of India for the general purposes of such Government.

2.—Regulating any of the current coin, or the issue of bills, notes, or other paper currency.

3.—Regulating the conveyance of letters by the Post Office, or messages by the Electric Telegraph, within the Presidency.

4.—Altering in any way the Penal Code.

5.—Affecting the religion or religious rites or usages of any class of Her Majesty's subjects in India.

6.—Affecting the discipline or maintenance of any part of Her Majesty's Military or Naval Forces.

7.—Regulating patents or copyrights.

8.—Affecting the relations of the Government with Foreign Princes or States.

It is, however, provided by this section that no law, or provision of any law or regulation which shall have been made by any such Governor

in Council, and assented to by the Governor-General as aforesaid, shall be deemed invalid only by reason of its relating to any of the purposes comprised in the above list.

Under the powers contained in Section 44, the Governor-General in Council, on the 17th January 1862, by proclamation, extended the provisions of the Act touching the making of laws and regulations for the peace and good government of Madras and Bombay to the Bengal Division of the Presidency of Fort William. By the same section he has power, from time to time, in his discretion, subject to the provisions of Section 49, to extend the same provisions to the North-Western Provinces and the Punjab; and by Section 46, he is further empowered to constitute, from time to time, new Provinces, to which the provisions of Sections 42 and 43 shall be applicable, and to appoint a Lieutenant-Governor to any Province so constituted in like manner as is provided by Act 17 & 18 Vict., Cap. 77, respecting the Lieutenant-Governors of Bengal and the North-Western Provinces; and by Section 48, it shall be lawful for every such Lieutenant-Governor in Council thus constituted to make laws for the good government of his respective Province.

The Governor-General in Council has power, by Section 40, to declare or withhold his assent to the laws and regulations passed by such Governors, or Lieutenant-Governors in Council under the authority of the Act. Her Majesty, by Section 41, has also power to disallow the same.

Previous to 1834, when the Legislative Council of India came into existence under 3 and 4 Will. IV., Cap. 85, each Presidency Government had power for itself to enact, what were called, Regulations; but in that year this legislative power ceased, and until the coming into operation of the Indian Councils' Act, which received the Royal assent on the 1st August 1861, the Legislative Council of India was the sole legislative body. Since the coming into operation of that Act, the power of legislating has, within the limits above-mentioned, been restored to Madras and Bombay; and from the year 1862 the Local Legislatures of Bengal, Madras, and Bombay, pass Acts accordingly.

In a recent case, *The Queen* v. *Reay*, which had been referred to the High Court of Bombay, by the Magistrate of Ahmedabad, for its opinion, whether one Lieutenant Reay, a European British subject, could be legally convicted and punished by him, under Section 31 of the Bombay District Police Act of 1867, for having, contrary to its provisions, driven a vehicle after dark, without lamps, in the town of

Ahmedabad,—the High Court quashed the conviction, on the ground that the Act affected those Acts of the Imperial Parliament which gave the High Court exclusive power to deal with offences committed by European British subjects, beyond the local limits of the ordinary original civil jurisdiction of the Court; and held that so much of the Act as related thereto was *ultra vires*. For the judgments delivered by Mr. Justice Gibbs and Mr. Justice Sargent in the case, see the *Times of India* of the 16th June 1870, and the *Daily Examiner* of the 21st June 1870.

In consequence of the doubts thus thrown upon the validity of such Acts of the Local Legislatures, in so far as they affect to render European British subjects liable to be convicted and punished by tribunals other than the High Courts of the three Presidencies, Act XXII. of 1870 has been passed by the Governor-General in Council, which purports to make valid every such Act, so far as regards the liability of European British subjects to be convicted and punished thereunder; and further enacts that every such Act shall be deemed to be and is as valid as if it had been passed by the Governor-General in Council.†

CALCUTTA HIGH COURT.

The 11th May, 1875.

PRESENT:

Mr. Justice Macpherson, *Officiating Chief Justice*, and Mr. Justice Lawford.

SHURRUT CHUNDER, *alias* BHOLANATH CHUTTOPADHYA* (*Plaintiff*,)

versus

RAJKISSEN MOOKERJEA and others (*Defendants*.)

Act XL. of 1858, Sec. 18—Sale by Guardian without sanction of the Court—Invalidity of Sale—Refund of Purchase-Money.

A sale of a minor's immoveable property by a guardian appointed under Act XL. of 1858, and who was also the kurta of the joint family of which the minor was a member, is invalid if made without the sanction required by Sec. 18 of that Act, even though the sale may have been for the benefit of the minor and made in good faith to pay off the debts of the ancestor.

Where, however, it was found that the purchaser had acted *bonâ fide*, and had paid a a fair price for the property, he was held entitled to a refund of so much of the purchase-money as had been expended for the benefit of the minor.

MACPHERSON, J.—There is but one point raised in this special appeal. The plaintiff seeks to set aside a sale made during his minority

---

* *Vide* 15, B. L. R., p. 350.

† *Vide* Broughton's Civil Procedure, p. 3.

by his elder brother Ashootosh Chatterjea, who was his guardian appointed by the Court under Act XL. of 1858.

The Court below has found that the purchaser (the respondent) did not act fraudulently in the matter; that he gave a fair price; and that the condition of the estate necessitated a sale. The question is whether such a sale is bad, and can now be set aside for the one reason that the sanction of the Court, which Sec. 18 of Act XL. of 1858 declares necessary, was never obtained.

Sec. 18 enacts that every person to whom a certificate shall have been granted "may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor; and may collect and pay all just claims, debts and liabilities due to or by the estate of the minor. But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained." This is not a simple direction that the sanction of the Court shall be obtained. It is a positive declaration that, in the absence of such sanction, the guardian has no power to sell. If the guardian, having no power to sell, does sell, does he pass a good title to the estate? All persons being presumed to know the law, it must be presumed that the purchaser took with knowledge that, except with the sanction of the Court previously obtained, the guardian had no power to sell to him.

We have been able to find only three cases reported which bear at all upon the question, and in no one of them is it actually decided.

The first is *In the matter of the petition of Busunto Coomar Ghose*, where, the matter not arising for judicial decision, it is said by Jackson, J., that the guardian in granting a mortgage of the minor's property acted in direct violation of Sec. 18 of Act XL., and that the mortgage so executed without the order of the Court, would be invalid.

The Court of Wards, v. *Kupulman Singh* was a case under the Lunatics Act, XXXV. of 1858. The words in Sec. 14 of that Act are the same as those in Sec. 18 of Act XL. of 1858,—that the manager shall not have power to sell or mortgage without an order of Court previously obtained. Referring to this section, Phear and Morris, J.J., have declared that, without the sanction of the Court, the manager can pass no good title.

A Division Bench in *Alfootoonissa* vs. *Goluck Chunder Sen* declined to disturb a mortgage made by a guardian without sanction. But this

was after a suit (to which the minor was a party) had been brought on the mortgage, and a decree had been given in favor of the mortgagee.

However much we may desire to support a purchaser who has not acted dishonestly, and by whom a fair price has been paid, we think it impossible to declare a sale valid which is made by a guardian without the sanction which Sec. 18 requires. The words are very strong. It is not merely that they contain a direction that the sanction of the Court shall be obtained: they say without an order of Court previously obtained the guardian shall absolutely not have the power to sell. It seems to us we are bound to treat the sale as made by one having no power in the matter, and therefore as bad. The purchaser who, knowing that he is dealing with a guardian, chooses to ignore the provisions of the Act, has no one but himself to blame if he suffers from the consequences of his negligence.

As, however, the lower Court finds that the conduct of the purchaser was not dishonest, and that he paid a fair price, we shall declare that the plaintiff is entitled to be restored to possession with mesne profits on his repaying to the purchaser so much of the money paid by the purchaser as has been applied to the benefit of the minor's estate. The purchaser on being repaid so much as shall be found to have been applied for the benefit of the minor with interest at 6 per cent. on the money so paid, must give up possession to the plaintiff, accounting for mesne profits for the time he has been in possession.

The decrees of the lower Courts are set aside, and the suit must go back to the Court of first instance in order that the necessary inquiries may be made, and accounts taken in order to the carrying out of the directions we now give.

We may add that we do not think that the position of the purchaser (respondent) is in any way stronger by reason of the accident that the guardian appointed under Act XL. of 1858 happened also to be the elder brother and natural guardian (if such he really was) of the plaintiff. Having been appointed under Act XL. of 1858, he could no longer act for the minor otherwise than under his appointment by the Court. If one, who is the natural guardian, is appointed by the Court, and acts under the appointment, he can have no powers other than that given him by Act XL. of 1858.

The appellant will get his costs of this appeal and in the lower Courts.

ENGLISH LAWYERS.

Lawyers, or counsellors, for the terms are nearly synonymous, are of two sorts or degrees, *barristers* and *serjeants.* The former are admitted to plead at the bar, and take upon them the advising and defence of clients, after a certain period of attendance in the inns of court. A *serjeant* is a more ancient description of the learned profession, created by the queen's writ, and who, from being more intimately acquainted with the practice of the common law, enjoyed, till the court was thrown open to all barristers of the superior courts by the Act of 1846, the exclusive privilege of pleading in the court of Common Pleas. It is from the class of serjeants-at-law, or *serviens ad legem,* as they are termed in legal documents, that the fifteen judges were taken until the Judicature Act, 1873, did away with this custom.

From both these degrees the Queen's Counsel are selected; the two principal of whom are the attorney and solicitor-general. They are not allowed to be employed in the criminal prosecutions against the Crown without a license, which is never refused.

It is usual to grant patents of *precedence* to such barristers as the queen thinks proper to honor with that distinction; by which they are entitled to such rank and *pre-audience* as is assigned in their respective patents. These, as well as the attorney and solicitor-general of the queen consort, rank promiscuously with the crown's counsel, and, together with them, sit within the bar of the court, but receive no salaries, and are not sworn, and therefore are free to be retained in causes against the crown.

Pre-audience, or the right of serjeants and barristers to be first heard by the court, is a point of so much importance at the bar, that it may be proper to state the order of precedence as settled by royal mandate:—

1. Queen's Advocate-General.
2. Queen's Attorney-General.
3. Lord Advocate of Scotland.
4. Queen's Solicitor-General.
5. Queen's Premier Serjeant.
6. Queen's Ancient Serjeant or the oldest of the Queen's Serjeants.
7. Queen's Serjeants.
8. Queen's Counsel, and Counsel having patent of precedence before April 24, 1834.
9. Serjeants-at-law.
10. Recorder of London.
11. Common Serjeant of London.
12. Advocates of the Civil Law.
13. Barristers at large, according to the dates of their call to the bar.

In forensic pleading, a barrister has privilege to enforce anything communicated to him in his professional capacity, if pertinent to the matter in issue, and is not bound to examine whether it be true or false. But to bring an observation within the rule of being spoken in judicial course, it must be strictly relevant to the matter in issue; and the client's ignorance of what is, or is not, so relevant, will often protect *him* before the court, where the advocate, from the presumption of superior legal knowledge, would not stand excused.

A counsellor can maintain no actions for his *fees*, which are given, not as a salary or hire, but as a gratuity, which a barrister cannot demand without injury to his reputation. On the other hand, a client cannot maintain an action to recover back a fee to counsel for negligence; want of zeal, or skill in the conduct of his cause; nor even if he fail to attend to argue a cause for which he has received a fee, *Peakes R.* 122. But if counsel accept a fee, and become counsel, and discover his instructions to the opposite side, an action lies. And a counsel signing a bill in Chancery, containing scandalous or impertinent matter, is, on complaint, liable to pay costs.—*Cabinet Lawyer, p.* 238.

PRIVY COUNCIL.

The 13*th February*, 1875.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

LOKHEE NARAIN ROY CHOWDHRY,* *Defendant*,

versus

KALYPUDDO BUNDOPADHYA and SHAMAPUDDO BUNDOPADHYA, *Plaintiffs*.

On Appeal from the Calcutta High Court.

Suit by a Certified Purchaser—S. 260 *of Act VIII. of* 1859.

Section 260 of Act VIII. of 1859 must be construed strictly and literally, and is applicable only to a suit brought against a certified purchaser to assert a benamee title against him. Where the certified puchaser is a Plaintiff, the real owner, if in possession, and if that possession has been honestly obtained, may shew in defence that the holder of the certificate is a mere trustee.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH.—This suit was brought by the widow and two sons of *Ishan Chunder Bannerjee* against *Baboo Lokhee Narain*

---

* *Vide* 2, Law Reports, Indian Appeals, p. 154.

Roy, to recover possession of a 9-annas share of the zemindary called *Kishenpoora*. The case set up in the plaint was that the nine annas had been purchased at an auction sale held in execution of a decree obtained against a lady of the name of *Monmoheenee Dabea*, and that the certificate of purchase was given to *Ishan Chunder*; and it is alleged that *Lokhee Narain Roy* obtained forcible possession of the nine annas subsequently to the certificate of sale. The defence was that *Ishan Chunder* was the manager of *Lokhee Narain*, and had purchased the nine annas benamee for him. It appears that *Lokhee Narain* is himself the owner of seven annas of the zemindary, and that *Monmoheenee* was the owner, for life only, of the other nine annas; and that it was her life interest which was sold. It would seem also that *Lokhee Narain* claims the reversionary interest after *Monmoheenee's* death in those nine annas.

The Judge in settling the issues refused to lay down any issue upon the question whether the purchase was benamee or not, in consequence of a decision of the full bench of the High Court of *Calcutta* which had determined that it could not be shewn against the holder of a certificate of sale under an execution that he purchased benamee for another, whether the suit was brought by any person against him, or was brought by such holder himself as Plaintiff. The section of the *Code of Civil Procedure* upon which the question turned is sect. 260, and the words applicable to the question are these :—" And any suit brought against the certified purchaser on the ground that a purchase was made on behalf of any person not the certified purchaser, though by agreement the name of the purchaser was used, shall be dismissed with costs." It was held by this Committee in appeal from the case referred to,—the case of *Mussumat Buhuns Kowur* v. *Beharee Lall* (1),—that this section should be construed strictly and literally, and was applicable only to a suit brought against the certified purchaser to assert the benamee title against him, that the statute did not make benamee purchases illegal, and that the real owner for whom the purchase was made, if in possession, and if that possession had been honestly obtained, might defend a suit brought by the holder of the certificate and shew that he was the apparent owner only and a mere trustee. However, these issues being settled before the case had been decided on appeal, the Judge of course felt bound by the decision of the full Court and settled the following issues only :—" First, is the Defendant in possession of the disputed

(1) 14, Moore's Ind. Ap. Ca., 496.

share of the zemindary under circumstances which amount to a transfer to him of the title which the Plaintiffs derived from their purchase (made by *Ishan Chunder Bannerjee*)? If not, can the Plaintiffs obtain the relief sought for, and if in possession under such circumstances can the Defendant's possession be disturbed?" The Judge adds the note, " The plea set up by the Defendant, that the Plaintiff's father had purchased the property in question benamee for Defendant's benefit, and with his money, was not allowed under the full bench ruling of November 12, 1868."

In *Mussumat Buhuns Kowur* v. *Beharee Lall* (1), it was stated in the judgment of the High Court that if the certified purchaser was really benameedar, or a trustee for another person, and after the certificate of sale did some fresh act to put the real purchaser into possession, that might operate as a transfer of the property to him. They say:—"If a person who has gained a title by limitation, waives that title in favour of the real owner, and gives up possession to him as the rightful owner, such act would probably be held to amount to a waiver of the right which he had gained by limitation, and to confer it upon the real owner. In like manner, if a benameedar should acknowledge the purchase to have been made benamee, and waive the right conferred upon him by sections 259 and 260, and give up possession to the real purchaser as the rightful owner, such act would probably amount to a transfer of the title as well as of the possession to the real purchaser." This passage in the judgment was the authority under which the Judge laid down the two issues. It is obvious that in the decision of those issues it becomes material to inquire under what circumstances possession was given by one party to the other, and whether by reason of the antecedent relation between the parties it was meant to operate as a transfer of the property. Therefore the relation of the parties, whether they really were benameedar and beneficial owner, was very proper to be inquired into and tried upon the issue in fact laid down; and accordingly the Judge of the Court of *Cuttack*, having taken evidence as to the sale and the circumstances under which it was made, proceeded to give his opinion upon the question whether the purchase was made by *Ishan Chunder* on his own behalf, or as the manager, and on behalf of *Lokhee Narain*.

A good deal of evidence was given upon that question, but the

(1) 11, Suth. W. R., F. B., p. 20.

learned Judge seems to have rested his decision entirely upon two witnesses, and resting his decision upon those witnesses he came to the conclusion that the purchase had been made by *Ishan Chunder* on his own account and with his own funds. He says:—"*It is proved from the* evidence of two of the most trustworthy of their witnesses, both of them native gentlemen, whose evidence is entitled to the fullest belief, viz., *Kanye Lall Pundit* and *Baboo Mohun Persad Roy*, that the purchase of the zemindary in dispute was made by *Ishan Chunder* on his own account and with his own funds." Their Lordships will refer to that evidence presently, but it seems to them that the learned Judge has drawn too broad a conclusion from the facts which they proved. On the case coming before the High Court, the Judges seemed to think that it was unnecessary to go into the facts. They thought themselves bound by the decision of the full Court, and that they could not inquire into the transaction of the sale, whether it was benamee or not, and so tying their hands they came to the conclusion that what was done after the sale did not amount to a transfer of the property from *Ishan Chunder* to *Lokhee Narain.* Their judgment proceeds on those short grounds.

As the law at present stands, it is open for their Lordships to consider what was the real state of the case between these parties, and whether or no this purchase was made by *Ishan Chunder* on his own account, or on behalf of *Lokhee Narain.*

It is right to see in the first place what was the relation between the parties. It is plain, and indeed is not denied, that *Ishan Chunder* had been for a period of about a year the manager of this zemindar, *Lokhee Narain,* and had the possession and management of some at least of his funds. It seems that a month only before this sale, he had advanced a sum of Rs. 4,400 to this lady *Monmoheenee* upon a mortgage bond. That bond was taken in his own name, but it is admitted by the Plaintiffs that the bond, although taken in his own name, was in respect of an advance out of *Lokhee Narain's* money, and that he held the bond on behalf of, and as benameedar fòr, *Lokhee Narain.* The transaction of this sale followed soon after. The lady appears to have been in difficulties. A creditor obtained a judgment against her, and there was to be a sale in execution of her life interest in nine annas of an estate in which *Lokhee Narain* held the other seven in his own right, and a reversionary interest in the nine that were sold. It would be a very proper thing for his general manager to look after that sale and see whether he could make an advantageous purchase for him.

It seems to be a fair conclusion from the evidence that *Ishan Chunder* had no express instructions previous to the sale from *Lokhee Narain* to purchase these nine annas for him. But these facts are proved, that *Russool,* who was an agent, or acting at that time as an agent, of *Lokhee Narain,* was a bidder for these nine annas, and had bid Rs. 2,260 for the property. At that stage, when he had given that bidding, which was the last of four, somebody suggested to him that he ought not to bid for the zemindar, but that *Ishan Chunder,* the manager, was the proper person to purchase the property for *Lokhee Narain.* Accordingly the evidence is that *Ishan Chunder* was called into the room, the state of the biddings made known to him, and then he made upon the last bidding of *Russool* the small advance of Rs. 2. If the witnesses are believed, he took the bidding out of *Russool's* hands, who was professing to act for *Lokhee Narain,* saying at the time, or shortly after, that he purchased for *Lokhee Narain.* No doubt that depends upon the credit due to the witnesses, but there are circumstances in the case which corroborate them. There is the undoubted relation in which *Ishan Chunder* stood to the zemindar; the facts, also, that *Russool* bid no more, and the very small advance upon his previous bidding seem to shew that there was an understanding between the two agents, otherwise it is very unlikely that that small advance should have stopped the biddings, and that the property should have been knocked down at that point.

But not only do the circumstances attending the bidding at the sale give corroboration to the story, but the subsequent conduct of *Ishan Chunder* is inconsistent with his having purchased on his own account, and is entirely consistent with the view that he purchased on behalf of the zemindar, for whom he was acting as manager. The possession is one of the real facts in the case about which there can be little dispute. It is not pretended that *Ishan Chunder* or his sons after his death obtained anything more than formal possession by the officer of the Court. They obtained that formal possession. How did they lose it? They assert in their plaint, and for a purpose, that *Lukhee Narain* took forcible possession. There is not the slightest evidence of it, and it is conceded now that nothing like forcible possession was or could be taken. But what is proved is this,—by two ryots who appear to have no interest one way or the other,—that they went to *Ishan Chunder,* hearing that he was the auction-purchaser, to pay their rents. One of them says he went to him in the first place and was told by him to go to *Lokhee Narian* and pay it. The other says that he went first of all to

Lokhee Narian, who told him that *Ishan Chunder* was the auction-purchaser. He went to him, and *Ishan Chunder* said: "It is true I am the auction-purchaser, but the rents are payable to *Lokhee Narain*." There is beyond that the fact that *Lokhee Narain* received the rents from those two ryots, and therefore was in possession so far as possession can be obtained of property which is in the hands of ryots.

He also paid the Government revenue. The petitions he presented to the Collector have been relied upon by the Plaintiffs as shewing that he did not then put forward his own title. He made no allusion to it in either of the petitions, and in the second petition he put forward *Ishan Chunder* as the owner of the property. It is perfectly well known to be a common practice in *India* where property is in the name of a man, although not the true owner, that all the proceedings as far as the Government is concerned take place in his name. All that *Lokhee Narain* then wanted to do was to pay the Government revenue, so that the estate should be in no danger of being forfeited. Their Lordships think that no very strong inference can be drawn against him from the fact that in the petition he states the title according to what it ostensibly was. It is stated by several witnesses that before *Ishan Chunder* left *Cuttack* to go to *Calcutta* he promised *Lokhee Narain* to give him a kobala for the property, saying: "There is no immediate haste about it; you are in possession; it shall be done when I return." He went to *Calcutta* and died there. His sons returned to *Cuttack*, and then made a claim to the property upon the ground that *Ishan Chunder* had purchased it for himself and out of his own funds. The question having arisen, the parties very sensibly called a punchayet to decide the matter between them, and three or four respectable persons appear to have assembled and to have heard the whole case. They came to the conclusion that *Lokhee Narain* ought to have the estate, but they also appear to have thought that *Ishan Chunder* had not funds in his hands sufficient to pay the purchase-money unless he had realized *Monmoheence's* bond. Probably the amount was not immediately available, and they directed that the bond should be given up by the sons to *Lokhee Narain*, having no doubt that it was a benamee transaction, and that the sons should convey the nine annas to the zemindar, on his paying Rs. 2,800, which is the purchase-money and interest, with a small sum for profit, the sons having contended that their father bought in order to sell again at a profit.

Now it is as well at this point to refer to the evidence of *Kanye*

Lall, the pundit, on which the Judge of *Cuttack* relied for the conclusion to which he came. That witness says, " Before the arrival of the Plaintiffs from *Calcutta*, *Lokhee Narain Roy Chowdhry* said that the zemindary of *Kishenpoora* had been purchased benamee in the name of *Ishan Baboo*, on which I replied that we shall know this when the son of *Ishan Baboo* arrives from *Calcutta*. Afterwards, when *Kalypuddo*, the said son of *Ishan*, came from *Calcutta*, he was one day called to the presence of *Lokhee Narain Roy Chowdhry*, and he said that the said zemindary was purchased by his father, and if a profit were allowed to him he would execute a kobala. This took place in my house at the time ;" several persons, mentioning them, " were present. I do not recollect who besides these were present. The *Baboo (Ishan)* had requested me and *Shodanund Mahapatur* and *Mokoond Pershad Roy* to take care of his property before he left." These two persons, then, one the pundit, were to take possession and manage *Ishan Chunder's* property in his absence. It might be expected that they would receive rent and pay the Government revenue if the estate had really belonged to *Ishan Chunder*. He goes on, " After his death, according to a letter written by his son *Kalypuddo*, we continued to take care of his property. We were assembled there with the object of coming to a settlement in respect of this *Kishenpoora* zemindary." He says the mooktears of both parties were present, and goes on thus : " We arranged that *Lookhee Narain* was to pay the purchase-money, together with interest from the date of purchase at the rate of 1 per cent. per mensem. *Kalypuddo* said that he would take a profit of Rs. 1,000, and the *Chowdhry* said, ' I will give Rs. 300 as profit.' On that *Kalypuddo* said that he would consider, and give his answer early next morning. This was what passed on that occasion. At the time of attempting a settlement the *Chowdhry* said that he would pay Rs. 2,800. The next day the *Chowdhry* sent me a sum of money, but I did not count how much." However, there is no doubt the money was sent. Then it appears that one of the sons intimated that in consequence of some advice he had received from his mother, he would not assent to the arrangement, nor would she ; and so it appears to have gone off. The other witness, *Kodanundo Mohapaller*, states the award still more explicitly. He says : " The arrangement was to the effect that when the sum of Rs. 2,800, together with the stamp for the kobala, was deposited with *Kanye Lall Pundit*, *Kalypuddo* and *Shamapuddo* should execute a kobala."

The award of the punchayet is really consistent with the case of

Lokhee Narain. They evidently came to the conclusion that *Ishan Chunder* had not funds in his hands sufficient to pay the purchase-money, but they thought that *Lokhee Narain* ought to have the estate, and they accordingly made an award, that he was to have the estate, and the others the purchase-money, allowing, probably by way of compromise, a small profit over.

Their Lordships, therefore, upon the whole matter, think that although *Ishan Chunder* may have had no previous instructions to purchase from *Lokee Narain,* yet that, being his manager, and finding himself at this sale, he purchased for him, after having stopped *Russool,* who was there before him bidding for the zemindar, in that operation. It would be contrary to equity to allow a man who steps in and assumes the character of a principal agent, and deposes another who was really acting as agent, afterwards to turn round and say, I purchased the estate, not for the principal, but for myself, and to obtain a profit out of the estate he had so purchased. *Ishan Chunder* himself does not appear to have intended to act in this manner, because, as already observed, he gave possession of the estate to the zemindar, by directing the tenants to pay their rents to him, and does not appear to have interfered in any manner inconsistent with the character he took upon himself at the sale—the character of a manager for the zemindar.

Under these circumstances, their Lordships think that the judgments of the Courts below cannot be sustained, but they are anxious that the whole question between these parties should be determined without further litigation. In their view, the parties having agreed to submit to the award of arbitrators, it is right and equitable that if the estate is maintained in the zemindar *Lokhee Narain's* hands, he should pay to the representatives of *Ishan Chunder* the Rs. 2,800 which the arbitrators thought was the proper sum to be paid to them, together with interest thereon. It is difficult to fix the precise date from which the interest should run, but their Lordships think it is equitable the Respondents should receive interest for six years at 6 per centum per annum, making the sum of Rs. 1,008 for interest. Their Lordships are desirous to secure the execution of this arrangement, and they will therefore humbly recommend Her Majesty to reverse the decrees below, and to direct that in case the Appellant pays into Court within six months the sum of Rs. 3,808 (being the Rs. 2,800 and interest thereon as aforesaid), the Respondents be at liberty to take such sum out of Court upon executing a kobala of the property to the Appellant, the stamp of which is

to be paid by the Appellant, and that upon such payment into Court being made, the suit be dismissed, and the Respondents do pay to the Appellant the costs of the litigation in *India* and of this appeal.

That in case the Appellant does not pay the above amount into Court, the suit at the end of the said six months be dismissed, but in that case without any order as to the costs in *India* or of this appeal, and without prejudice to the right of the Respondents to retain the certificate of sale, and to take such proceedings as they may be advised to recover any moneys due to them from the Appellant in respect of the purchase of the said property or otherwise.

ACTIONS AGAINST GOVERNMENT.

Now, generally, it may be said that, under the English constitution, the Crown, the Government, or State cannot be sued in its own Courts; neither can any of the officers or servants of the Government be made liable for anything *bonâ fide* done by them on the part of, and as the agents of, Government. In the event of any person being aggrieved or injured by the acts or omissions of a Government servant or department, the remedy, if any there be, can only be sought by petition of right, unless the Government servant, to whose fault the grievance is attributable, so conducted himself in the matter as to render himself personally liable. And this holds true with regard to the colonies as well as with regard to the mother country. To some extent the case is seemingly, though not essentially, different with regard to India. While the Government of this country was in the hands of the East India Company, the Company never entirely lost its private or commercial character: even when it was directed, by 3 and 4 William IV., c. 85, to abstain from all commercial business, an exception was made as to such as might be carried on for the purpose of Government. It has often been ruled in the English Courts that the fact of the East India Company having been invested with powers, usually called sovereign powers, did not constitute them a sovereign—*Bank of Bengal* v. *East India Company* (Bign. 120) and *Moodalay* v. *East India Company* (1, Br. Ch. Ca., 469); and in the case of *P. and O. Company* v. *The Secretary of State* (Bourke's Rep., Pt. vii., 166, at pp. 188, 189), it was explained by the late Supreme Court that "the East India Company were not sovereigns, and therefore could not claim all the exemption of a sovereign, and that they were not the public servants of Government, and

therefore did not fall under the principle of the cases with regard to the liabilities of such persons, but they were a Company to whom sovereign powers were delegated, who traded on their own account, and for their own benefit, and were engaged in transactions, partly for the purpose of Government, and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts so done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them." And it was clearly pointed out by the Supreme Court, on an examination of the leading cases, that, in regard to matters and undertakings of the latter kind, the East India Company were liable to be sued, " though where an act is done or a contract entered into in the exercise of powers usually called sovereign powers, by which we mean" (the Court says) " powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie." And when, by 21 & 22 Vict., c. 106, the Government of India was transferred from the East India Company to Her Majesty, it was enacted in s. 65 :—" The Secretary of State in Council shall and may sue and be sued, as well in India as in England, by the name of the Secretary of State in Council as a body corporate ; and all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company." Hence all suits, such as might, before the passing of 21 & 22 Vic., c. 106, have been brought against the East India Company, may now be brought against the Secretary of State in Council ; and these seem to be limited to suits for acts done in the conduct of undertakings which might be carried on by private individuals without sovereign powers.*

A suit was brought by a company for damage done to one of their horses through the negligence of some men employed at one of the Government dockyards, which dockyard was carried on by the Government in the same way, and for the same purposes, as any private firm or company might have carried on a similar business. It was tried by Macpherson, J., sitting at that time as the First Judge of the Small Cause Court, and the question of the defendant's liability was referred by him

* *Vide* the judgment of Phear, J., in the case of Nobin Chunder Dey, *vs.* The Secretary of State for India reported in I., Indian Law Reports, Calcutta Series, p. 12.

to the Supreme Court as a point of law. The case was heard by Sir Barnes Peacock and two other Judges of the Supreme Court, and resulted in a most learned and elaborate judgment, in which, after going very fully into the provisions of the Statute, and examining all the authorities with great care, the Court decided that the Government of India were responsible to the plaintiffs in that suit upon the express ground that the negligence complained of was an act done by their servants in carrying on the ordinary business of ship-builders (unconnected altogether with the exercise of sovereign powers), and which any firm or individual might have carried on for the same purposes. It was held that, because the East India Company would have been liable in such a case before the Act (21 and 22 Vic., c. 106), the Government of India was equally liable after the Act came into operation; and the distinction was very carefully drawn between acts done by the East India Company in their private capacity and acts done by them in the exercise of those sovereign powers, which were entrusted to them by the Crown for purposes of Government. "There is a great and clear distinction" (says Sir Barnes Peacock) "between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them;" "But where an act is done or a contract entered into in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie."*

The case of *Nobin Chunder Dey*, vs. *The Secretary of State for India* (reported in I., Indian Law Reports, Cal. Series, p. 11) was in substance as follows: The plaintiff says—At the public auction, which was held by the Government officer on the 4th of March 1874, of licenses to sell certain excisable liquors and drugs, I became the highest bidder for the right to sell such liquors and drugs at five different shops at Calcutta; I paid the deposit upon my purchase, and did all that was necessary to entitle me to the licenses. I demanded these licenses from the Government officials, and I failed to obtain them. Furthermore, I paid the duties upon certain excisable articles of the same character which I kept in my godowns; but notwithstanding this payment, I could not obtain from the Government officers the necessary papers to enable me to ob-

* *Vide* the judgment of Garth, C. J., in the case of Nobin Chunder Dey, reported in I., Indian Law Reports, Cal. Series, p. 25.

tain these articles. The consequence was, that I was obliged to close my shops. I sustained heavy damages upon the resale of goods, as well as in other ways, entirely through the wrongful acts and default of the excise officials; and I am therefore entitled in the first place to be compensated for all the damage which I have sustained, or failing that, I am at least entitled to have the deposit which I paid on the purchase of the licenses returned to me. Sir Richard Garth, Kt., Chief Justice, in delivering judgment (Mr. Justice Macpherson concurring) said:—"The persons who are said to have been guilty of the acts and default of which he (the plaintiff) complains, are officers employed in that department of the Government service which relates to the imposition and collection of the excise duties. The ground of the complaint is that those officers have been guilty of various breaches of duty in not fulfilling obligations to the plaintiff which they were bound to fulfil in that capacity.

"Now it is impossible to doubt for a moment that the laws which are made in this or any other country for the taxation of the subject by the imposition of customs and duties, are laws which can only be made or enforced in the exercise of sovereign powers properly so called. and these sales, at which the plaintiff contends that he purchased the rights on which he claims, only constitute a portion of the machinery and arrangements by which the imposition and collection of the excise duties are regulated in this country. His claim is therefore clearly one of those which cannot be enforced against the Government of India."

In the above case (*i. e*, *Nobin Chunder Dey* vs. *The Secretary of State for India*), Mr. Justice Phear remarked that, if "the plaintiff has a cause of suit which would have been good against the East India Company before transfer of the Government of India to the Queen, and therefore has a right to be compensated out of the public revenues of India, he ought to have designated the defendant as Secretary of State for India in Council. If his cause of suit is not of this character then he ought to fail, for he has not attempted to make out any ground of action against the Secretary of State for India, or any specific person."

CALCUTTA HIGH COURT.

The 2nd June, 1875.

PRESENT:

Mr. Justice Macpherson, *Officiating Chief Justice*, and Mr. Justice Lawford.

SHAIKH KYASUTULLAH, (*Plaintiff*,)*

versus

DOORGA CHURN PAL, (*one of the Defendants*.)

Registration Acts (XX. of 1866,) *s.* 18, *cls.* 1 *and* 2, *s.* 50 ; *and (VIII. of* 1871,) *s.* 18, *cls.* 1 *and* 2, *s.* 50—*Priority of Registered over Unregistered Document—Compulsory and Optional Registration.*

A registered deed of sale, of which registration was compulsory, does not take effect against a prior unregistered mortgage bond in respect of the same land, the registration of which, it being for a sum under Rs. 100, was optional.

MACPHERSON, J.—We think that the decision of the Judge is wrong.

Sec. 50 of Act XX. of 1866 says that a registered document of which the registration was optional (*i. e.*, falling under cl. 1 or 2 of s. 18) takes effect against an unregistered document relating to the same property. In this case it is sought to give effect to Doorga Churn Pal's registered bill of sale against the plaintiff's prior unregistered mortgage.

The plaintiff's mortgage (dated the 28th Sraban 1277, or 9th August 1870) was for Rs. 95 only: therefore, under s. 18 it was not necessary to register it. The consideration for Doorga Churn Pal's bill of sale (dated the 5th Assar 1279, or 18th June 1872) was Rs. 300; therefore, under s. 17 it was necessary to register it. Registration was optional in the case of the plaintiff's deed, but compulsory in the case of Doorga Churn Pal's. So that what the Judge has decided is that under s. 50 a registered document, the registration of which was compulsory, has effect against a prior unregistered document, the registration of which was optional. But this is not what is enacted by s. 50, which says only that a document of the kinds mentioned in cls. 1 and 2 of s. 18 (*i. e.*, one the registration of which is optional) shall have effect against any unregistered document. Doorga Churn Pal's bill of sale being a document the registration of which was compulsory, did not fall under s. 18 at all: therefore s. 50 has no application to it. This was so decided in the case of *Hamed Bux*† vs. *Bindrabun*, and the law remains

* *Vide* 15, B. L. R., p. 294.

† 2, All. H. C. R., 37.

unchanged in this respect by the new Registration Act of 1871, although the result is somewhat anomalous.

The decree of the Judge is reversed and the decree of the Munsif is restored and affirmed. The appellant is entitled to his costs in this Court and in the lower Appellate Court.

PREROGATIVE OF THE CROWN.

It is a universal rule that prerogative and the advantages it affords cannot be taken away except by the consent of the Crown embodied in a Statute. This rule of interpretation is well established, and applies not only to the Statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rules recognized in England. In the case of *Ganpat Putaya* vs. *The Collector of Kanara* (reported in I., Indian Law Reports, Bombay series, p. 7) the plaintiff, Ganput, obtained a decree against one Jivaji, and in execution caused a debt due by one Meghji to Jivaji to be attached by a prohibitory order under Sec. 236 of Act VIII. of 1859. This attachment took place when Jivaji's suit against Meghji, which was brought in *formâ pauperis,* was pending. When this pauper suit terminated, and Meghji was ordered to pay Jivaji a sum of Rs 200, the Collector of the District intervened, and made application to obtain Rs. 70-2 2, being the amount of Court fee which Jivaji would have had to pay if he had not been permitted to sue as pauper. As this amount was ordered to be paid to the Collector, the plaintiff, Ganput, brought a suit to recover it, on the allegation that his attachment was prior to the Collector's, and that consequently he had the right of prior satisfaction. The case coming on in appeal before the Bombay High Court (West and Navabhai Haridas, JJ.) West, J., in delivering the judgment of the Court said :—" The decision of this case turns upon the construction of Section 309* of the Code of Civil Procedure. Its direction that the amount of fees, which would have been paid by the pauper plaintiff, shall, on decision of the suit, be recoverable by Government from any party ordered by the decree to pay the same in the same manner as costs of suit are recoverable, does not preclude the Crown or its representative from urging its prerogative and insisting upon its

* Sec. 309 of Act VIII. of 1859.—On the decision of the suit, the Court shall calculate the amount of fees chargeable under the Court Fees' Act, 1870, which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, and such amount shall be recoverable by Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable.

right to precedence. The circumstance of its being placed in the position of judgment-creditor does not reduce its rights of necessity to those of a private judgment-creditor in case of a contest as to prior satisfaction out of moneys realized in execution. * * * * * * As the Government Pleader urged at the bar, if this precedence be not allowed to the Crown, the issue of prohibitory notices under Section 236 of the Code of Civil Procedure, instead of furthering justice, would, in many cases, defeat it by defeating the Government's claim for costs altogether." The decree of the lower Court dismissing the suit was, therefore, confirmed.

Note the above under ss. 270 *and* 309 *of Act VIII. of* 1859.

BOMBAY HIGH COURT.

The 25th June, 1874.

PRESENT :

Mr. Justice Nanabhai Haridas and Mr. Justice Larpent.

REG. *v.* UTTAMCHAND KAPURCHAND* and others.

The Code of Criminal Procedure, Sec. 119—*The Indian Evidence Act, Secs.* 91, 155, *and* 159—*Statements made to the Police.*

Section 119 of the Code of Criminal Procedure not making it obligatory upon a police officer to reduce to writing any statements made to him during an investigation, neither that section, nor Section 91 of the Indian Evidence Act, renders oral evidence of such statements inadmissible. If the statements be actually reduced to writing, the writing itself cannot be treated as part of the record or used as evidence, but may be used for the purpose of refreshing memory under Section 159 of the Evidence Act. Consequently, the person making the statements may properly be questioned about them ; and, with a view to impeach his credit, the police officer himself, or any other person in whose hearing the statements were made, can be examined on the point under Section 155 of the Evidence Act.

The judgment of the Court was delivered by

NANABHAI HARIDAS, J.—The object of a trial in every case is to ascertain the truth in respect of the charge made. For this purpose it is necessary that the Court should be in a position to estimate, at its true worth, the evidence given by each witness, and nothing that is calculated to assist it in doing so ought to be excluded, unless, for reasons of public policy, the law expressly requires its exclusion. Bearing this in mind, let us see how the case stands here.

It is complained in this case that the accused were not permitted to elicit from witnesses for the prosecution that they or some of them had before made statements inconsistent with their evidence before the

* *Vide* 11, Bom. H. C. R., p. 120.

First Class Magistrate. This is admitted by the First Class Magistrate, whose reason for so refusing permission we shall presently consider. When it is intended to throw discredit upon the evidence of any witness for the prosecution, nothing is more common in practice than for the counsel for the defence to prove, if it can be proved, that that witness has previously made statements inconsistent with his evidence at the trial. When this fact is satisfactorily established, the Court cannot but regard the evidence of such witness with suspicion, and the fact is established by the evidence of any one to whom such statements were made, or in whose presence and hearing they were made. But the First Class Magistrate is of opinion that if the statements are made to a policeman, who chooses, under Section 119 of the Code of Criminal Procedure, to reduce them to writing, they are, by that section, rendered inadmissible, and cannot be proved by the evidence of witnesses to whom or in whose hearing they were made. If the section were capable of no other construction than the one the Magistrate has put upon it, we should be bound to adopt that view, though thereby the criminal courts and counsel for the defence should be deprived of one of the modes of testing evidence adduced for the prosecution. But we are of opinion that the Magistrate has misunderstood the meaning of that section, which runs thus :—

" An officer in charge of the police station, or other police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

" Such person shall be bound to answer all questions relating to the case, put him by such officer, other than questions criminating himself.

" No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence."

The meaning of the section, so far as it has reference to the point we are now considering, is this.

A police officer may examine any person acquainted with the facts of the case.

He is not bound to reduce into writing any statement made by that person, though, if he wishes to do so, he may reduce it into writing.

If he does so, such written statement shall not be treated at the trial as part of the record or as evidence, which means that though it may be used by the police officer to aid him in his investigation, it is

not to be used by the prosecution as evidence to establish the accused's guilt.

To our minds it is clear, from the wording of the section itself, that when a person makes a statement to a police officer which is not "reduced into writing" by him, such statement is not inadmissible in evidence under this section, since it does not profess to provide for such a case. The police officer may, therefore, be questioned as to such statement by the counsel for the defence, as also any other person who may have heard it made. And it is equally clear that when it is "reduced into writing," the section does not say that the police officer, or such other person, shall not be liable to be questioned as to it, or bound to state the truth when so questioned, but that the "statement so reduced into writing" (that is, the writing itself,) shall not be "used as evidence." Consequently, the police officer and such other person, if any, notwithstanding Section 119 of the Criminal Procedure Code, continue as liable to be questioned with regard to such statement as they were before its enactment, and may, under Section 159 of Act I. of 1872, make use of such writing to refresh their memories, though the writing itself cannot be "used as evidence." The rule which is laid down in Section 155 of that Act, that "the credit of a witness may be impeached" * * * * * * * "By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted," and which has always been the rule of evidence both in England and in India, is thus left untouched by the subsequent enactment, Section 119 of the Code of Criminal Procedure. The view of ours, though it might at first sight seem opposed to Section 91 of the Evidence Act, is not in reality so, as the statement made to the police officer is not a matter required by a law to be "reduced to the form of a document," so as, under that section, to exclude oral evidence thereof from the mouth of the police officer, or such other person.

Such being our view on this point, we are of opinion that the Magistrate was wrong in not permitting the accused to show, by eliciting answers to that effect in cross-examination, that the witnesses for the prosecution, or some of them, had previously made statements inconsistent with their evidence in Court. This was "a material error" on his part within the meaning of Section 297 of the Code of Criminal Procedure. We must, therefore, reverse the conviction, and send the case back, in order that he may pass a new judgment in the case, after

allowing the accused to show, if they can, that any of the witnesses for the prosecution have made inconsistent statements, and are, therefore, not worthy of belief, and after recalling for that purpose any of such witnesses as the accused may desire to recall under Section 218 of the Criminal Procedure Code. In any judgment he may pass after doing so, the Magistrate should be directed to comply with the provisions of Section 464 of the Criminal Procedure Code.

SHORT NOTES.

CALCUTTA HIGH COURT.

Hindu Law—Inheritance—Sudras—Illegitimate Sons—Validity of Marriage between persons of different Castes.

According to the doctrines of the Bengal school of Hindu law, a certain description only of illegitimate sons of a sudra by an unmarried sudra woman is entitled to inherit the father's property in the absence of legitimate issue, viz., the illegitimate sons of a sudra by a female slave or a female slave of his slave.

Per Mitter, J.—Marriage between parties in different sub-divisions of the sudra caste is prohibited unless sanctioned by any special custom, and no presumption in favor of the validity of such a marriage can be made, although long cohabitation has existed between the parties.

Per Markby, J.—Quære, whether there is any legal restriction upon such a marriage?

Vide 1, Indian Law Reports, Calcutta Series, p. 1. (Markby and Mitter, JJ.) The 6th March 1875. Narain Dhara (Appellant.)

Hindu Law—Inheritance—Brothers of the whole blood and of the half blood.

By the Hindu law current in Bengal a brother of the whole blood succeeds in the case of an undivided immoveable estate in preference to a brother of the half-blood.

Vide 1, Indian Law Reports, Calcutta Series, p. 27. (Full Bench, Mr. Justice Macpherson, Officiating Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Birch, and Mr. Justice Morris) the 18th June 1875. Rajkishore Lahoory, (Appellant.)

Revocation of the authority of arbitrators.

The making the submission to arbitration a rule of Court has not the effect of depriving a party of his right to revoke, at any time before the award, the authority of arbitrators whom he has appointed; still less

could it have any effect to prevent him from declining to appoint an arbitrator.

Vide 1, Indian Law Reports, Calcutta Series, p. 42. (Mr. Justice Phear.) The 27th and 31st May 1875. C. Coeglar and others (Plaintiffs).

HIGH COURT—N. W. P.

Full Bench Rulings.

Act X. *of* 1872, *ss.* 4, 297—*Judicial Proceeding—High Court—Powers of Revision.*

An appeal having been preferred to the High Court against a judgment of acquittal of the Court of Session, the persons who had been acquitted were arrested by the police and brought before the Magistrate, who illegally directed that they should be detained in custody pending the decision of the appeal.

Turner, Offg. C. J., and Pearson, J. were of opinion that the High Court had no power, as a Court of Revision, to interfere with the order, as it was not a judicial proceeding, *i. e.*, a proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence (as defined in Section 4 of the Code of Criminal Procedure), and as the High Court can only interfere under s. 297 of the Criminal Procedure Code which says "If it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit."—Spankie and Oldfield, JJ., *contra.*

Vide 1, Indian Law Reports, Allahabad Series, p. 1. (Turner, Offg. C. J., Pearson, Spankie and Oldfield, JJ.) The 2nd July 1875. Queen *vs.* Gholam Ismail and another.

Act X. *of* 1872, *ss.* 468, 469—*Prosecution—Sanction—Jurisdiction.*

Held that the sanction referred to in ss. 468 and 469 of Act X. of 1872, when given by any of the Courts empowered under the Act, cannot be disturbed by a Superior Court.

Per Turner, Offg. C. J., and Pearson and Oldfield, JJ.—When sanction is refused by one of the Courts, the refusal does not deprive the other Courts of the discretion given to them.

Vide 1, Indian Law Reports, Allahabad Series, p. 17. (Turner, Offg. C. J., Pearson, Spankie and Oldfield, JJ.) The 3rd July 1875. Barkat-ul-lah Khan *vs.* Rennie and another.

Act XIX. of 1873, *s.* 241, *cl.* (1)—*Revenue—Pattidar—Suit for Contribution—Jurisdiction—Civil Court—Revenue Court.*

The question in the case was whether the plaintiff, a pattidar, who had paid a sum on account of a demand for Government Revenue, should

sue to recover from the defendants, his co-pattidars, the balance in excess *of his own quota in the Civil or in the Revenue Court.*

Held (Spankie, J., dissenting) that the Civil Courts were competent to entertain suits of the nature.

Vide 1, Indian Law Reports, Allahabad Series, p. 26. (Turner, Offg. C. J., Pearson, Spankie and Oldfield, JJ.) The 17th August 1875. Ram Dial and others (Defendants) *vs.* Gulab Singh and others, (Plaintiffs).

Letters Patent, cl. 10—*Appellate Civil Jurisdiction—Appeal from Judgment of Division Court.*

To allow of an appeal to the High Court against the judgment of a Division Court, under the provisions of cl 10 of its Letters Patent, there must be such a judgment on the part of all the Judges who may compose the Division Court as disposes of the suit on appeal before it.

Vide 1, Indian Law Reports, Allahabad Series, p. 31, (Turner, Offg. C. J., Pearson, Spankie and Oldfield, JJ.) The 17th August 1875. Ghasi Ram *vs.* Musammat Nuraj Begam.

Act IX. of 1871, *ss.* 4 *and* 5*b.*—*Admission of Appeal after the period of Limitation—Single Judge and Division Court—Jurisdiction.*

Held that the order admitting an appeal after time, made *exparte* by a single Judge of the High Court sitting to receive applications for the admission of appeals, under a rule of the Court made in pursuance of 24 and 25 Vic., c. 104, s. 13 and the Letters Patent of the Court, s. 27, was liable to be impugned and set aside at the hearing by the Division Court before which it was brought for hearing, on the ground that the reasons assigned for admitting it were erroneous or inadequate.

Vide 1, Indian Law Reports, Allahabad Series, p. 34. (Sir Robert Stuart, Kt., C. J., and Pearson, Turner, Spankie and Oldfield, JJ.) The 21st August 1875. Dubey Sahai *vs.* Gawshi Lal.

Act XLV. of 1860, *ss.* 59, 377—*Punishment—Transportation in lieu of Imprisonment.*

When an offence is punishable either with transportation for life or imprisonment for a term of years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment.

Vide 1, Indian Law Reports, Allahabad Series, p. 43. (Turner, Offg. C. J., and Pearson, Spankie, and Oldfield, JJ.) The 23rd August 1875. Queen *vs.* Naiada.

Hindu Law—Stridhan—Inheritance—Unchastity.

Per TURNER, *Offg. C. J.*, and OLDFIELD, *J.*—Unchastity in a woman does not incapacitate her from inheriting *Stridhan.*

Per PEARSON and SPANKIE, JJ.—Unchastity in a woman does not preclude her from keeping possession by right of inheritance of *stridhan.*

Vide 1, Indian Law Reports, Allahabad Series, p. 46. (Turner, Offg. C. J., and Pearson, Spankie and Oldfield, JJ.) The 23rd August 1875. Mussamut Ganga Jati *vs.* Ghasila.

BOMBAY HIGH COURT.

The Code of Criminal Procedure, Section 263—Trial by Jury—Acquittal —Verdict reversed.

The Code of Criminal Procedure, Section 263, casts upon the High Court the duty both of Judge and Jury, but notwithstanding this difference, which clothes it with greater powers and responsibilities than the Superior Courts in England, it will, as far as may be, be guided by the principle of English law that the verdict of a Jury will not be set aside unless it be perverse and patently wrong, or may have been induced by an error of the Judge. In a proper case, however, the High Court will rectify the verdict of a Jury.

Vide 1, Indian Law Reports, Bombay Series, p. 10. (West and Nanabhai Haridas, JJ.) The 12th October 1875. Reg. *vs.* Khanderoo Bajirav and six others.

Abetment—Acquittal of principal no bar to conviction of abettor.

The offence of abetment under the Indian Penal Code is a substantive offence The conviction of an abettor is, therefore, in no way dependent on the conviction of the principal.

Vide 1, Indian Law Reports, Bombay Series, p. 15. (West and Nanabhai Haridas, JJ.) The 12th October 1875. Reg. *vs.* Maruti Dada and others.

Limitation Act (IX. of 1871), *Schedule II., Nos.* 166, 167.

An Act of Limitation, being restrictive of the ordinary right to take legal proceedings, must, where its language is ambiguous, be construed strictly, *i. e.*, in favor of the right to proceed.

A as purchaser of a decree against *B* applied for execution thereof, and having caused five fields of *B* to be sold in execution, purchased four of them at the court sale, and one from an execution-purchaser. On the 10th July 1871, however, the High Court, in a Miscellaneous Special Appeal by *B* held *A's* application for execution to have been time-barred, and reversed the orders of the two lower Courts. *A* having been put in possession of the fields under the orders of the lower Courts, *B*, on a reversal of those orders by the High Court, applied, on the 9th July 1874, to have the fields restored to him together with mesne profits accruing during the time of his dispossession. The first court

awarded the fields to *B* with mesne profits; but the District Judge, on appeal, held *B's* application barred under Act IX. of 1871, Schedule II., No. 166.

Held by the High Court that the exception in No. 166 of the Limitation Act IX. of 1871 is not restricted to any particular species of appeal, that *B's* application fell within No. 167 and not within No. 166 of the Limitation Act of 1871, and, therefore, was not barred.

Vide 1, Indian Law Reports, Bombay Series, p. 19. (Westropp, C. J., and Kemball, J.) The 12th October 1875. Umia Shankar Lakhmiram *vs.* Chhotalal Vajeram.

Jurisdiction—Letters Patent, 1865, *Clause XII.—Cause of Action —Hundi—Consideration—Usage of Shroffs.*

Where a *hundi* had been drawn out of the jurisdiction, upon a person within the jurisdiction, indorsed and delivered, out of the jurisdiction, to one who, out of the jurisdiction, indorsed the same and sent it to a person who, within the jurisdiction, received it, got it accepted, and presented it for payment to the drawee, by whom it was dishonored within the jurisdiction:

Held that the dishonor of the *hundi* by the drawee within the jurisdiction was a material part of the cause of action by the holder against the first indorser and, consequently, that such material part of the cause of action having arisen within the jurisdiction, and the holder having obtained leave to bring his suit under Clause XII. of the Letters Patent, 1865, the court had jurisdiction to entertain the suit.

The plaintiff, as agent and banker of an Ajmir constituent, received a *hundi* for collection, and, on its acceptance by the drawee, credited the Ajmir constituent with the amount as of the date when the *hundi* would become payable.

Held, that as between the plaintiff and the Ajmir constituent, the plaintiff upon such credit in account being given, became a holder for value.

Held also that, on the *hundi* being dishonored at due date by drawee, the plaintiff was justified, by the usage of *shroffs,* in treating the Ajmir constituent as still entitled to credit for the amount, and himself as a holder for alue.

Held also that, as between the Ajmir constituent and the first indorser (the defendant and appellant), the giving by the Ajmir constituent to the defendant of another *hundi,* which was never presented in Bombay for acceptance or payment was a consideration for the indorsement by the defendant to the Ajmir constituent of the *hundi* sent by the latter to the plaintiff and sued on by him.

Vide 1, Indian Law Reports, Bombay Series, p. 23, (Westropp, C. J., and Sargent, J.) The 15th October 1875. Mulchand Joharimal *vs.* Suganchand Shivdas.

PROPERTY IN LAND, IN ENGLAND AND INDIA

(Being the substance of a lecture delivered by the Hon'ble J. B. Phear, one of the Judges of the Calcutta High Court, at the Bethune Society, on the 27th January, 1876.)

On inquiring into the growth of proprietary rights in land, we find the joint-family at its very origin. The village was at first, and still is in a large degree, a group of such families, often all sprung from or appendant to a central family. They were seldom, however, even from the very outset, all of equal rank.

The mode in which this came about may be taken to be pretty accurately ascertained, for the founding of a new village in waste and unoccupied ground has always been a not uncommon occurrence. In the days of Manu, according to the Institutes, it was quite probable in any given case that persons might be alive who remembered the foundation of the village ; and at the present time every settlement report sent in to Government will be found to furnish instances, and to describe the circumstances, of newly created agricultural communities. We shall hardly be wrong if we assume that the process which we see in operation now-a-days does not differ essentially from that which gave rise to the village in archaic times. I imagine that one or two enterprizing persons more or less connected together by ties of relationship, started the little colony. Of these, doubtless, one would, in some special manner, be leader, and would together with his family after him maintain a pre-eminence in the new society. Next would come the family of the man who was the leader in, or who became charged with the care of, religious matters.

Very soon other persons would be allowed to cultivate land, and to have place within the ambit of the new settlement upon terms as to the situation of their allotment, performing work on the land of the leaders, and other conditions of subordination. Others again would merely obtain the comparatively civilized shelter afforded by the village against the perils of the outside wilderness, pursuing therein convenient handicrafts, or performing servile tasks.

Land was not conceived of as the subjeet of property in the modern sense, or as belonging to any individual. Each village had its bounda-

ries, which early came to be most precise, and the entire space within these belonged to the whole village. Every family, however, appropriated to itself or became the owner of the homestead which it occupied, and the garden or orchard attached thereto, and often too its particular tank. So much of the land within the village boundaries as was needed for cultivation was apportioned among the recognized families. At first this was done merely for the year's tilling, then at longer intervals, and later still only on the occasions of considerable changes in the families, and so on. The grazing ground, the waste, and the wood-land (or jungle) was common to all alike. In the early days of village civilization, the agricultural element was comparatively small, and it was both easy and advantageous that the culturable plots should be changed, as just mentioned, at more or less frequent periods. As, however, larger areas came to be taken into cultivation, and increased skill and labour to be applied to the reclamation and culture of the soil, and non-annual crops to be growing, it followed naturally that the different families ultimately got to retain permanently in their hands either the whole or the better portion of their respective allotment.

The cultivation of the family plot was effected as a rule by the members of the family alone. But the leading family and the priest family, no doubt, from the beginning inherited and enjoyed much prestige and priority of consideration which enabled them to attain to a position of privilege. They seem generally to have cultivated more or less by servants or by the means of *batai* agreements. And it is not improbable that, originally at any rate, their servants and *batai* occupants were drawn from the, so to speak, interloper portions of the inhabitants of the village, *i. e.*, those who could not claim their part in the village soil by derivative rights from the founder.

Thus there grew to be, even from the commencement, a gradation of respectability and employment within the village itself; and it is very noticeable that there were two privileged heads of the village, secular and religious.

As population increased and became more fixed, the cultivation of cereals and pulses became more necessary and engrossing; and the value of cattle became greater, as being both the cultivating power and the means of exchange. For reasons already suggested, the recognized founders' family and the priests' families, doubtless, obtained advantages in the allotment of *khets*, both in regard to situation and quantity, and became the wealthiest members of the community, *i. e.*, possessors of the

largest herds, and cultivators of the biggest *khets* with the least expenditure of manual labour. They were also the principal guides and directors of village affairs. And so it came about that to own and look after cattle (the symbol of wealth) was respectable, and (so to speak) the occupation of a gentleman, as distinguished from the manual labour of the field.

After these we have the remainder of the families entitled as of old right to participation in the village lands, and essentially agricultural in occupation. And then there is the class of relative strangers or outsiders, namely, artizans and petty traders, followed by a servile class, hewers of wood, drawers of water, scavengers, &c.

Thus far we encounter no indication that any real approach has been made towards personal *property* in land. We have found that each family in time got the right to retain continuously year after year its own particular plots for cultivation ; or at any rate did so for those which they had respectively by special pains reduced from waste, or which had other peculiarities ; and we have arrived at the conclusion that the leading families, out of all the families entitled to the village lands, got the best of it in these particulars. Subsequently, again, as families broke up, it came to be acknowledged that the members of each had a right to distribute among themselves the family *khets* for cultivation.

But still the proprietary conception went no further than this, namely, that the particular plot of land which the family or individual claimed was that part of the village land which he or it was entitled to cultivate, or to have cultivated for his own benefit.

A further development of the social system, and a new source of land rights, was brought about by the attrition of village with village.

The exclusiveness of the Âryan family was its marked characteristic. In the earliest beginnings to which we can get back, to use the words of a recent historian of Greece, "the house of each man was to him what the den is to the wild beast which dwells in it ; something, namely, to which he only has a right, and which he allows his mate and his offspring to share, but which no other living thing may enter except at the risk of life."—1, Cox's Greece, p. 13. The same spirit can be perceived animating the Hindu family throughout all its stages, even down to the present time ; and so it was necessarily the governing principle of the group of families which constituted the village, in its relation to its neighbours as soon as it had any.

Each little colony or *abad* held itself aloof from and independent of all others; jealous of its rights, and quick to resent, as well as to defend itself from encroachment. And as villages thickened causes of quarrel increased—pasturage grounds—reclamations—profitable jungle tracts—fuel—thatching grass—bamboo clumps, &c., &c.—until at last, it may be said, the normal relation between the *abads* was one of chronic hostility.

Collision on these points led to fights in which, no doubt, the head of the leading family in the village was the director, and the different members of that family, both from their position and from their comparative independence of manual occupation, were the principal actors.

The common consequence of these fights was that the successful party not merely vindicated its own rights, but seized and occupied some of the best lands of its antagonist, and carried off his herds, and so on. And as in those early days fighting was mainly an affair of personal prowess, these acquisitions were appropriated by those whose strong arms had won them. The conquered *khets* came to belong, in a new sense, to the leader of the expedition, and those to whom he awarded them. And we may safely assume that he appropriated to himself the lion's share of the captured cattle. Thus was introduced a peculiar cause of aggrandisement of the leading family and its adherents. Already distinguished by family blood, by wealth, and by hereditary position and partial immunity from hand labour, they now acquired great additional wealth from the outside, became possessors of *nij* lands in foreign villages; and above all became invested with that personal influence and authority which attaches to successful fighters. The beaten villages, at first probably, only suffered the loss of the appropriated *khet* and of the stolen herds. But this must have had the effect of impoverishing some of its inhabitants, and of increasing the numbers of the dependent population. So that the invaders would at once find it easy to enforce or procure the cultivation of their newly-acquired lands upon *batai* terms. But cultivation by servants, or on *batai* conditions was not in itself novel; it was only extended as the result of these proceedings. The really new ingredient of tenure which came in through them was the complete independence of the village community even in theory which characterised the victor's retention of these lands.

Results such as these, of course, tended very soon to give rise to fighting expeditions, for their own sake, and upon an enlarged scale. Time and distance were involved in them; and the fighters had then to

be maintained while away from home. At first this would be managed out of the principal man's wealth: he assigned portions of his land to the more prominent among them, generally on conditions of service, and supported others out of his own stores, flocks, and herds. Then the non-fighters of the primary village would contribute rations in kind. And next, perhaps, even before this step, each subdued village would be made to pay a permanent tribute of produce in kind.

Here we have before us the growth of a chieftainship and a fighting class, mostly sprung in the first instance from the village founder's family, but also including others who had won their place by the side of these through strength of arm. And when in this way an energetic and relatively powerful family had won supremacy over many villages, its head became a hereditary local Chief, and the fighting men constituted a diminutive aristocracy, most of them actually and all reputedly of the same blood as the Chief. The causes which led to this development were of universal operation; and so sooner or later, all villages fell under this kind of dominion, and the originally free *abads* became subordinated in groups to Chiefs and Rajahs. Also the Chiefs and Rajahs with their several little attached aristocracies, each hereditarily separate from their people, came to be collectively regarded as a noble military governing race, such as the Rajpoot of historical times. If the celebrated *Kshatriya* caste ever had more reality than belongs to mere mention in Brahmanical pages, it (and it certainly has no reality now) doubtless arose in this fashion. (See Growse's Mathura, Appendix A.)

Similarly, from those of the original settlers, who discharged in each *abad* the functions of priest and moral teacher, came the great clerkly race-caste of Brahman. They were in the first instance generally, no doubt, closely connected with the head of the colony himself, and like him obtained advantages in the allotment of land, and in getting it tilled for them. Thus freed from the necessity of manual toil, and devoted to the humanizing pursuit of religion and advancement of knowledge, they ultimately came to constitute, by hereditary separation, a singular class of aristocracy,—seldom wealthy, but always of vast influence in their several communities.

As their generations widened, their increasing wants were met by assignments of land made by the Chiefs and others.

And being the repositories of all learning, and in possession of priestly powers, as society progressed, they gradually monopolized all that existed in the way of public offices, and attained an importance,

which as a rule much exceeded that of an ordinary member of the fighting or warrior class, and closely approached that of the Chief himself. The aggregate of these everywhere were *Brahmans*. It is possible that out of the same materials a third hereditary class, also reputed to be of pure and unmixed descent from the founders of the settlement, may have developed itself and acquired a social status of privilege. For it is conceivable that besides the fighting men and the teachers, some few others of the original settlers or their decendants may by good fortune in husbandry or likely enough by joining trade therewith have contrived to distinguish themselves in wealth above their fellows, and to free themselves from the toil of agricultural labour; and may at the same time have avoided the ranks of the Chief's adherents. I confess I think this last supposition extremely improbable, for in the stage of civilization which is here being considered, an unlettered man of leisure and wealth could scarcely have found a respectable alternative to that which for want of a better term we may call the profession of arms, and which must have been looked upon as the gentleman's occupation. If, however, such a segregation could have originally taken place, and if notwithstanding the want of the discriminating force which is incident to a community of employment, purity of family blood could be maintained in this body, then like the fighting and the clerkly classes it would enjoy an aristocratic pre-eminence, and would answer to the caste which has been described by Brahmanical writers under the designation *Vaisya*, but whose existence, so far as I know, has never been otherwise evidenced.

The great bulk, however, of the descendants of the original settlers (speaking of villages in the mass) were unable to rise above the common level, were less careful of purity of blood, or of preserving any mark of descent from the immigrant race. With them gradually came to be intermixed people of all kinds, aborigines, run-aways from other *abads* from cause of pauperism, feud or otherwise, some of whom came to be even allowed a portion of the village lands.

The social development which I suppose to have been thus effected may be concisely and roughly described as follows :—

(1.) The immigrant and growing population in each different tract or district of country, although made up of village units, in course of time acquired as a whole a certain homogeneity of physical appearance and of character, peculiar to itself, being the product of various influences, such as circumstances of the district, general habits of life of the people, infiltration of foreign ingredients, and so on.

(2.) A hereditary aristocratic class rose to the top of each community or people (so distinguished), and established over it a domination which bore characteristics resembling those of feudalism in Europe.

(3.) And a clerkly class in substance, hereditary known everywhere as the Brahmans, in like manner came into social pre-eminence, and managed to appropriate to itself the influence and authority of the priest and the teacher.

I may venture here to say (though my opinion in itself is worth very little) that I quite agree with Mr. Growse in thinking that there never was at any time in Indian Aryan society a hereditary *Vaisya* class; and as I have already mentioned, I cannot percieve in the conditions under which I imagine that society to have been developed any cause adequate to its production. Probably the *Brahman, Kshatriya, Vaisya,* and *Sudra* of the Brahminical codes were only the Utopian class distinction of a prehistoric More.

Although there may be some difficulty in conceiving the exact nature of the process by which the result number (1) is produced, there can be no doubt, I apprehend, that in some stages of society, at any rate, it is a reality of very active operation. In quite recent times, we have under the designation of Yankee an instance of the origination by immigration into a new country of a novel and very distinct type of people, marked by physical and intellectual characteristics of the highest order.

And a glance over the ground which is covered by the Aryan race in India will show that while there can be no question as the community of race character possessed by the different populations, there has also been at work upon them respectively strong local influences and special modifying causes. To take large divisions, it is impossible not to see that the population of the Punjab differs uniformly and materially from that of the Kumaon, and similarly the latter again from the populations of Bengal and Orissa. I will make no endeavour now to seek out these influences and causes for each case, because to do so would carry me somewhat wide of my present purpose.

On the theory put forward the two privileged classes (2) and (3) ought to be distinguished from the commoner local population by such marks as purity of descent (*i. e.*, descent preserved from the freer intermixture prevailing around), together with the relative elevating habits of a leisured life can confer; and yet should participate with that popu-

lation in the general characteristics which serve to separate them from the populations of other localities. And that this is so in India is, I think, as a rule, abundantly apparent. In the Chapter of the Star of India lately held in Calcutta, the small groups of noblemen who stood around, say for example, the Maharaja of Pattiala, the Maharaja of Gwalior, and the Maharaja of Rewah, respectively, were as markedly different from each other in feature of countenance and bodily proportions, and could be as readily recognized separately, as if the comparison were made between them and the like number of Englishmen. And the same assertion may be made relative to the Brahman. The general results in regard to rights of property in land, of the social progress, and course of change which I have endeavoured to represent, were very simple.

The village community stood out with great distinctness as a self-governing agricultural corporation. Every family in it, except those which were purely servile or which had never become recognized as sharers in the customary rights, had its allotment of village land for cultivation; it had also the right to pasture its cattle over the belt surrounding the village, and on other pasture grounds of the village if any; and a right to take what it wanted of the jungle products within the village limits.

The local Chieftain had a portion of lands in *all* the villages subordinate to him which was in a special manner his own, and was additional to the substantial share which he had of the communal rights. The other members of the warrior class often had, besides their own village lands, an assignment of land from the Chief in some village, not necessarily their own, which they held in more or less dependence upon him. And the Chief, further, had a tribute of a certain portion of the produce of every village allotment (exclusive of those of the Brahman and the warrior) which he could use as he pleased for the support of himself or his followers, and which he often no doubt assigned pretty freely to favorites and others on conditions of service and otherwise.

The Chief and the other members of the warrior class (or feudal aristocracy) and the Brahman seldom or perhaps never took any personal part in cultivation. They either tilled their lands through servants, or oftener allowed other persons to occupy and till them upon condition of yielding up a portion of the produce, they themselves probably (at least in the earlier days of the practice) furnishing cattle, seed and other agricultural capital. And arrangements of this kind could be altered by the persons concerned at their convenience. But the land allotment

generally was an affair of the village, and although the ordinary village cultivator was obliged to pay tribute in kind in respect of his share to the Chief, he could not be disturbed in the possession thereof by him. There never was, so far as I can discover, any assumption on the part of the Chief of a right of possession in respect of the cultivators' share of the village land or of a right to disturb that possession. And all question of right and all disputes within the village were settled on a basis of custom and equity by the village panchayet, wherein the Chief either in person, or represented by a superior servant, had a voice. In all this there is at most conceived only the right to cultivate land, and a deputing of that right to another in consideration of a share in the produce. And little or no approach had up to this stage been made to the idea of property in land as a commodity, and of power to alienate it, or even to hire out the use of it for a money payment. The Chief was in a sense lord of the villages which were subordinate to him, and entitled to a share of the produce from every cultivator therein; but he was not *owner* in the modern English sense, and had no power to dispose of the possession of any land except his *nij* land, and with regard to this he only had the right to cultivate by himself or by his servants, or to get somebody else to do it on condition of dividing the produce. No other practice was known or thought of, and in early stages of society, practice, or custom precedes and is the measure of right.

At first sight the distinction which I am endeavouring to draw may appear to be without a difference; the produce of the land must have been in effect divided much in the same way between the cultivators and the Chief who took tribute in kind as if the parties were true landlord and tenant. But on looking closer it will be found that the two relations differ very materially, and that the one I am dwelling upon is anterior to the latter as a matter of progress. It is especially important to remember that the share of produce, which the Chief could take was not regarded by his own pleasure, or by the making a bargain, but by custom, or practice in regard to which the village panchayet was the supreme authority. And that the Chief had no power to turn the cultivator out of possession.

When these quotas of produce were in the course of progress turned into money payments, or their equivalent, they still did not become rent paid for occupation and use of land as an article belonging to and at the disposal of the person paid, but were dues payable to a superior ruling authority by the *subjects* of that authority. The Chief, though ze-

mindar of *all* the land within the zemindary, was at most landlord (and that in the very qualified sense of one merely having the right to dispose of the occupation and tilling of the soil) of so much of it as was his *nij* land, and in some instances probably of the wastes. The machinery of this system was the zemindar's kachahri, the centre of local authority, side by side with which was the panchayet, *i. e.*, the old abad self-government.

I am unable to adduce the direct evidence of any historical writer in favour of this view, but there is a good deal in the old codes which tends to support it indirectly.

In Manu, not a very ancient writer, though probably as old and respectable an authority as we can go to, there is nowhere any mention of land as a subject of property in the modern English sense. Private ownership of cultivated plots is recognized, but it is simply the ownership of the cultivator. The land itself belongs to the village. There is no trace of rent. The owner is only another name for cultivator. He is indeed under obligation to cultivate lest the Rajah's or lord's dues in kind be shortcoming. But he might cultivate by servants, of whose doings he knew little or nothing, or arrange with some one else to cultivate on a division of crops (*i. e.* the *batai* system, a form of metayer.)

In another place of Manu we find every one enjoined to keep a supply of grain sufficient for his household for three years. And it is evident that almost everybody is supposed to be an actual cultivator.

Although the practice of *batai* is very like the small end of a wedge, which might have disrupted the primitive system, yet it did not in fact lead to the letting of land; and *rent* in any form seems to be altogether unknown to Manu.

Selling of land, or even of the use of land, does not seem to be anywhere directly alluded to. Contract of sale in some variety is spoken of, but nowhere, so far as I remember, in immediate reference to land. Appropriating a field, giving a field, and seizing a field, have all a place in Manu's pages, but not buying or selling a field. The passage in p. 303 s. 114 of Sir W. Jones' translation (quart. ed.) when rightly rendered, does not give rise to the inference that land was there contemplated as a subject of purchase.

Somewhat later in time, no doubt, according to the *Mitakshara*, separated kinsmen had acquired uncontrolled power of disposing of their respective shares of the family allotment. This, however, did not amount to a dealing with a specific portion of land as a thing of property, but

was a mere transfer of a personal cultivating right, incidental to personal status in the village community, and subject to an obligation to render to the lord his share of the produce. And for this cause it was necessary that the transaction should be accompanied by specified public formalities: and an out-and-out, sale was discountenanced except for necessity. Moreover, when the transfer was not absolute, but conditional by way of security for repayment of a debt, it always took the form of what is now called a usufructuary mortgage.

It seems to me pretty clear that the usufruct of land by actual tillage on the footing of a right of partnership in the village cultivating community, and not the land itself, constituted the object to which the words of ownership occurring in the Hindu law writers relate.

The same story is brought down to modern times by copper plates of title, old sanads, and other evidence of the like kind. These disclose the pretty frequent grant or assignment of the right to make collections and other zemindari rights made by a superior lord, or the gift of a plot from the waste, or out of the zemindar's *zeraiat*, to a Brahman or other deserving person. But I know of no instance of private transfer by purchase and sale of actual land, or of the lease of land in consideration of a rent.

The land system at which we have thus arrived is one of power or authority and subjection, rather than of property; and I may venture to say generally that it is the zemindar and raiyat system of Aryan India at the present day.

I have not now the time to illustrate this proposition adequately by examples. The state of things in Bengal has been so affected by direct legislation, and the spread of English real property notions, that I cannot appeal to it for this purpose without more explanation than I have here space for. But I will venture to say that Mr. La Touche's very interesting Settlement Report of Ajmere and Mhairwarra, recently published, supplies facts which serve to establish it for that district, notwithstanding that Mr. La Touche very often uses language which broadly declares the State's *right of ownership* in all the lands constituting the territory of the State. Mr. La Touche, I admit, appears to employ these words "right of ownership" in their widest English meaning; but I do not think that his facts require anything nearly so large. In his first passage on the "Tenures" of Ajmere, he says: "The soil is broadly divided into two classes khalsa or the private domain of the Crown, and land held in estates, or baronies by feudal Chiefs originally

under an obligation of military service," and I cannot help thinking that he has been misled by an analogy which his phraseology borrowed from feudal Europe suggests, and which, to say the best of it, is only imperfect.

As I understand the report, the general result may be stated thus: certain members of the village community enjoy the permanently cultivated or improved lands of the village by some recognized hereditary or customary right of cultivation, which is sometimes termed ownership and sometimes proprietorship. That if they pay the customary share of the produce to the person entitled to receive it, they consider themselves entitled to continue undisturbed in the occupation and cultivation of their land, or even to transfer it to another. That there is no such thing as the letting of land on terms of profit. That private sales of land are practically unknown, and that the sale of land by the Civil Court (an English innovation) has been prohibited because it is so opposed to ancient custom as to be incapable of being carried into effect. That mortgages are almost all of an usufructuary kind, and in Mhairwarra there is a kind of metayer system established between the mortgagor and mortgagee. That the State, as representative of the former superior Chief, collects the revenue (which is the modern equivalent to the old *customary share of the produce*) from the cultivators by certain agency machinery, and exercises other recognized chiefs' rights, except over lands in respect to which the Chief's rights to collect dues and otherwise were assigned by him to minor Chiefs, designated as istamrardars or jaghirdars, on conditions of military service, or for other consideration. That amongst the rights so exercised by the State and its assignees, was the right to dispose of waste land. And, finally, that although within the State area of collection the revenue is settled in the form of a money payment, in all jaghir estates the revenue is collected by an estimate of produce and money assessments are unknown.

If this concise statement of facts, drawn from Mr. La Touche's report, be approximately correct, as I think it is, provided the report be read cleared of expressions, which seem due merely to Mr. La Touche's implied theory of original State ownership, it accords singularly well with and justifies almost to the word the proposition which I have just ventured to make.

And this example is the more forcible, because Mr. La Touche says that "the land tenures are as might be expected entirely analogous to those prevailing in the adjacent Native States," an assertion which the result of my own personal inquiries enables me to confirm.

But the true relation between the Indo-Aryan land system and the modern form of absolute right of ownership of land which obtains in England will be best explained by drawing attention to the point at which the latter proceeded, or diverged from the former.

In Europe the course of change from the initial joint family village onwards was at first much the same in character as that which occurred here, but it early exhibited a very remarkable difference In the conflict of villages the strongest party did not limit itself, I imagine, as appears to have been the case in the East, to making appropriations from the waste, and to imposing a produce tribute on the cultivators of the defeated village, leaving them otherwise undisturbed in their possessions, and the management of their village affairs, but it turned the cultivators out of their land, taking the cultivation into its own hands and reducing the former cultivators to the condition of labourers or serfs The root of the village government and administration was thus destroyed; and in the place of the produce tribute was substituted a dominion over the soil—a difference which was all important and pregnant with the most weighty political consequences.

There was still, I conceive, at this stage no idea of ownership of property in land other than the idea of right to cultivate, no idea of right to land independent of the purposes of cultivation or other use of it. Thus the dominant party, by its leader and chief, took over the cultivation, distributing it probably in parcels amongst themselves, the Chief no doubt ultimately getting by for the largest share, and being especially the authority to distribute, while the subjected people became bound to labour for their masters, and on this condition were allowed to retain or occupy a homestead—and so to speak subsistence - plot of land. From this beginning grew up the manor corresponding in some degree though remotely to the oriental mouzah. The lord's demesne or cultivation comprised the bulk of the land, or at any rate the best of it; some portions of land became the cultivation of free men of the lord's race or belongings allied to him by military ties and by blood, and the rest was the subsistence land of the serfs, bound to labour on the lord's land. From this again at a later period the copyhold tenures developed.

But meanwhile and for a long time the lord was only owner of his land in the sense of cultivator and us or of it. He cultivated his land in his various manors through the intervention of a bailiff in each manor. In the course of social and economic change, the expense of this vicarious management became so great as to leave little or no profit for

the lord, and a new expedient suggested itself. The bailiff was dispensed with and the cultivation of the land was given out in portions to the more substantial serfs and others, on the terms of the lord providing the cattle, implements, and other cultivating capital (including seed grain), and the cultivator (now become farmer) remunerating the lord partly by money payments and partly by a share of the produce.

In some parts of Europe this led to a permanent metayer system, but in England it did not last long. The farming class speedily acquired capital enough to find themselves in cattle, &c, and to take in hire the cultivation or use of the land for a simple annual payment of money, *i. e.*, rent. And thus the ownership of land became permanently distinguished from the use and cultivation of it under contract with the owner; and the landlord and farmer became two grades of persons dealing with the same commodity, namely, the owner of it unskilled in using it, and the hirer of it for use.

On the other hand, those serfs who did not succeed in rising to the position of the farmer in the end sunk to be mere labourers, subsisting solely on wages earned by doing for the farmer and under his directions and control, the manual work of tilling the soil.

As long as right to land was inseparably associated with personal use of it, there was no thought of alienating it at the will of the person to whom the use belonged, but when it became a mere commodity, which was only valuable for as much as it would bring on being let out, then of course it also became freely alienable like any other commodity.

This stage has never been reached in the course of the purely oriental development. It is, however, hardly too much to say that the tendency of the natural economic and social forces of the country if allowed free play and given time would have been to make the land a commodity in the hands of the village cultivator or perhaps even of the mahajan rather than in those of the zemindar. But in Bengal the permanent settlement which gave an artificial right to the zemindars and the English civil courts which recognize the power of alienating every personal right capable of definition, have introduced disturbing forces of immense effect; and it would be rash indeed to attempt to foretell the ultimate result which may be expected in the course of progress if the Legislature should not again interfere. All that can be safely said is that the present is eminently a period of transition. The political consequences to which I just now referred would alone afford a very large subject for discussion. In the East, under the village system, the

people practically governed themselves, and the contest for power among the Chiefs of the noble class was mainly a struggle for command of the Kachahri *tabils*, the contents of which were spent in personal indulgence, royal magnificence, and splendid monuments to the glory of the successful competitor. In the West, such government of the people and administration of public affairs as there was fell to the lord and his courts. There were no collections, and a great portion of the means of maintaining and working the machinery of authority had to be obtained by some system of levy and taxation. These two differing sets of conditions led necessarily to intrinsically different political developments.

CALCUTTA HIGH COURT.

The 3rd *June,* 1875.

PRESENT:

The Hon'ble W. Markby and the Hon'ble H. B. Lawford, *Judges.*

ISHUR KHANT BHADOOREE AND OTHERS, *Petitioners.*

Act XX. of 1865, *S.* 11.—*Mookhtears—Civil Courts.*

Sec. 11 of Act XX. of 1865 does not empower *Mookhtears* to make applications in Civil Courts.

MARKBY, J.—The petitioners, in this case, who are *mookhtears,* state that one among their number presented an application for execution under Section 207, Act VIII. of 1859, on behalf of his client decree-holder in the Moonsiff's Court at Boalia, but that the Moonsiff returned the application upon the ground that it ought to have been presented through a pleader, and not through a *mookhtear.* The petitioner then applied to the Judge, but the Judge refused to interfere. And the present application is made to this court substantially asking us to issue an order upon the Moonsiff to receive the petition.

Now, the application which it was desired to make is one which, under Section 207, must be made to the court. Section 207 says: " When any party, in whose favour a decree has been made, is desirous of enforcing the same, he shall apply to the court * * * *." In substance, therefore, the present petition is that we should issue a direction which would have the effect of enabling *mookhtears* to make applications to the courts in the mofussil. Section 16 of the Civil Procedure Code provides that " All applications to any Civil Court, and all ap-

pearances of parties in any Civil Court, except when otherwise specially provided by this Act, shall be made by the party in person, or by his recognised agent, or by pleader duly appointed to act on his behalf." The *mookhtear* in this case does not claim to be a recognized agent; he does not base his right to make this application on the ground that he is a recognized agent, but on the ground that, as a *mookhtear*, he has a right to do so. It is quite clear that no such right is given to a *mookhtear qua mookhtear* by Section 16. The applicants, however, contend that the right is conferred by Section 11, Act XX. of 1865, which provides that pleaders may appear, and plead, and act in the courts therein named; and that *mookhtears* may appear and act in any Civil Court, whereas they may appear, plead, and act in any Criminal Court. And it is argued that the making of an application under Section 207 comes within the words " appear and act."

Now, in determining what part of the proceedings come within the words "appear and act," and what part of them come within the words "appear and plead,"—in other words, in considering what distinction the Legislature intended to draw between *acting and pleading*, we must look to what has hitherto been the practice of the courts in this country. The parties who make this application do not state in their petition that the construction which the Moonsiff has put upon this provision, differs in any way from the construction which has been hitherto put upon it since the Act came into operation. And as far as we are aware, the practice hitherto has been for applications of this kind to be made not by *mookhtears* but by pleaders. That alone would make us hesitate a good deal before we interfered with the order of the Moonsiff. But it also appears to us that the construction which the Moonsiff has put upon these words by his order, is the same which has been put upon the same words for many years on the original side of this court. There the advocates are by an express rule restricted to pleading (rule 12, at page 26 of Mr. Belchamber's collection of rules). And the attornies of the court are allowed, except in special and exceptional cases, to appear and act. And yet it has always been the practice on the original side to exclude attornies from making any applications in court, and to allow the Advocates, who have only the right to plead, to make such applications. Whether it is strictly correct to call the making of an application to the court on behalf of a suitor, pleading or not, may possibly be open to question. But when both the courts in the mofussil and this court in its original jurisdiction have for a long series of years, attached

a particular meaning to that expression, a division bench of this court would not be justified in setting that construction aside.

It has been argued that a distinction may be drawn between applications which are generally merely of a formal character and applications which required an argument to support them. But no authority or precedent for making any such distinction has been adduced, and it seems to be pretty manifest that it never can be certain until an application is made and granted whether or no any argument will be required in support of it, and we may, we think, say that, as a general principle, a party who makes an application must be ready and qualified to support it if the court calls upon him to do so.

It appears to us, therefore, that upon the proper construction of Section 11, Act XX. of 1865, upon which and not upon the Procedure Code this question turns, the decision of the Moonsiff was right, and that the District Judge was also right in refusing to interfere with that order, though at the same time we must say that we do not rely on the argument which he used, in refusing the application. It is not because the *mookhtear* is only to act as a *mookhtear* that we refuse to interfere, but because we consider that upon the construction which has been given to the word " plead," what the *mookhtear* was desirous of doing in this case does come under that term. The application will therefore be refused.

CALCUTTA HIGH COURT.

The 19*th May,* 1875.

PRESENT:

Mr. Justice L. S. Jackson and Mr. Justice McDonell.

DEEN DOYAL PORAMANICK* (Defendant) *Appellant,*

versus

KYLAS CHUNDER PAL CHOWDRY and others (Plaintiffs) *Respondents.*

Contract—Hindu Law—Interest.

The rule of Hindu law, prohibiting the recovery of interest exceeding in amount the principal sum lent, is not applicable to suits brought in Mofussil Courts in Bengal.

JACKSON, J.—The two questions raised in this appeal, which are of most importance, are, first, whether compound interest stipulated by the instrument on which the plaintiffs sue will run beyond the due date,

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 92.

which is the end of Choitro 1275; and secondly, whether, with reference to the Hindu law, the plaintiffs and the defendant being both Hindus, a larger amount of interest than the principal can be recovered. As to the first question, we can have no doubt, I think, that the terms of the bond appear clearly to import that there was to be payment of interest in two instalments,—*viz.*, a half-yearly and yearly payment, the word বৎসরে including not only the particular year which was to elapse before the amount was due, but each year until the whole sum was recovered. As to the second point, no authority has been laid before us to justify our adoption, for Courts in the mofussil, of the rule of Hindu law that more interest than the principal could not be recovered. We are referred to a decision of the Bombay High Court in *Khushalchand Lalchand v. Ibrahim Fakir*,* but the decision of the Bombay Court appears to have been based upon a legislative enactment in force in Bombay, to the effect that the Courts in that Presidency were, in the absence of any specific Act of Parliament or legislation, to apply the usage of the country, and in the absence of such usage the law of the defendant. In the Presidency town here, no doubt, it has been held that the rule of Hindu law in question has not been abrogated by Act XXVIII. of 1855, and that the Supreme Court was, and the High Court is, bound in its original jurisdiction to administer the Hindu law in matters of such contract; but in the case before us the provisions of Act VI. of 1871, contained in s. 24, are applicable. According to that section, the rules of Mahomedan and Hindu law are to be administered to parties Mahomedans and Hindus respectively, only in matters of succession, inheritance, marriage, or caste, or any religious usage or institution. We think, therefore, that there was nothing to prevent the Court below from awarding the amount of interest which is in conformity with the contract between the parties, nor that there is anything to show that the defendant had not entered into this contract with his eyes open, or that there is any equitable ground on which this Court should interfere. The appeal is dismissed with costs.



* 3, Bom. H. C. Rep., A. C., 23.

HIGH COURT—N. W. P.

The 20th July, 1875.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

FATIMA BEGAM* (Plaintiff) *Appellant*,

versus

SAKINA BEGAM and another (Defendants) *Respondents*.

Dwelling-place—Act VIII. of 1859, *s.* 5—*Act XXIII. of* 1861, *s.* 4.—*Jurisdiction*.

The fixed and permanent home of a man's wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of s. 5 of Act VIII. of 1859, and s. 4 of Act XXIII. of 1861.

The Court in delivering judgment said :—

The words dwelling or residence are synonymous with domicile or home, and mean that place where a person has his fixed permanent home, to which, whenever he is absent, he has the intention of returning. In *Lord* v. *Colvin*† it was held "that place is properly the domicile of the person in which he has voluntarily fixed the habitation of himself and family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home." And in a case cited in Broughton's Civil Procedure Code, *R.* v. *Murray*,‡ it was held that a man may have two dwelling-places, living sometimes at one and sometimes at another, and during his temporary absence each house though empty, if there be an *animus revertendi*, will still be his dwelling-house.

In the present case, Azim Khan, being a sawar in the Scinde Horse, his duties no doubt oblige his presence with his regiment for the greater part of his service, but the quarters of a regiment, always liable to be changed, are the temporary and not the permanent residence of the soldier; Azim Khan's family residence, admittedly within the jurisdiction of the Court, and the fixed and permanent home of his wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of the law.

* *Vide* 1, Indian Law Reports, Allahabad Series, p. 51.

† 4, Drew, 366; 28, L. J., Chanc., 361.

‡ 2, East, P. C., 496.

PRIVY COUNCIL.

The 6th November, 1874.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier. Assessor: Sir Lawrence Peel.

Appeal from the Calcutta High Court.

HURSUHAI SINGH* and others (Plaintiffs) *Appellants*,

vs.

SYUD LOOTF ALI KHAN (Defendant) *Respondent*.

Reformation of Submerged Land.

Where land which has been submerged reforms and is identified as having formed part (even by accretion) of a particular estate, the owner of that estate is entitled to it.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH.—Their Lordships, considering the turn that the argument has taken, do not think it necessary to go at any length in this case. The suit was brought by the Appellants, the proprietors of mouzah *Muteor*, in *Tirhoot*, against the Respondents, the proprietors of mouzah *Ramnuggur*, to recover the possession of a large quantity of land which had been submerged by the River *Ganges*. It appears that the river flowed between the estates of the Plaintiffs and the Defendants, and in its course between the two estates there were from time to time various changes. There were two or three defined channels, which at times the river overflowed, and formed a pool or lake. The land which is the subject of the present suit was submerged, and when it first became free from water and re-appeared, it adhered to and adjoined the estate of *Ramnuggur*, and *primâ facie* the accretion was to that estate; but upon an inquiry made by the Judge of *Patna*, who went to the spot, heard evidence, and took great pains to survey the district, he came to the conclusion that the submerged land, although it had reformed close to mouzah *Ramnuggur*, was, in point of fact, land which belonged to mouzah *Muteor*, and that there were means by which he could identify, and did identify, the land as having been, before its diluviation, part of that mouzah. He found those facts, and applying the law as he understood it to the facts, namely, that when submerged land can be identified upon its re-appearance as belonging to a particular estate, the proprietor of that estate is entitled to it because in truth he had never lost the land, the land was always his, and the difficulty of

* *Vide* 2, Law Reports, Indian Appeals, p. 28.

identification being removed by evidence—the land being in fact identified—there was no reason why the property should not be regained by him. He acted upon this principle of law, which had been at that time affirmed by the High Court of *Calcutta* in a case in which Sir *Barnes Peacock,* with two other Judges, had given the judgment. That, however, was the judgment of a Division Bench; and the High Court, upon appeal in the present suit, decided that they were bound by a subsequent decision of a full bench of the High Court, which had come to a contrary conclusion, and had held that land which re-appeared under circumstances like the present must be held to belong to the proprietor of the estate to which it had apparently accreted; and they remanded the cause to the Judge of *Patna,* who, without altering his finding on the facts, decided according to this view of the law, and his judgment was, as might be expected, upheld by the High Court, in the judgment now under appeal, on the case again coming before it upon the appeal of the present Appellants.

The question of law involved in these decisions, which is a very important one, was brought before this Committee, in a case of *Lopez* v. *Muddun Mohun Thacoor** in which the principles which should govern cases of this description were very fully discussed and elucidated, with the result that it was laid down by the authority of this Committee that where land which has been submerged reforms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it. It is admitted by Mr. Leith, the Counsel for the Respondents that the authority of this case and others which have followed it before this Committee, cannot be disputed. Their Lordships think the principles laid down in those cases are perfectly correct, and are distinctly applicable to the present; and that if the facts are to be taken as they were found by Mr. Justice Ainslie, the judgment below must be reversed. Their Lordships, for the reasons they gave during the argument, think it is impossible those facts could be disputed with any effect at their bar, and therefore both law and fact are in favour of the Appellants.

Mr. Leith endeavoured to distinguish between the lands which were the permanently settled lands of *Muteor* and some lands which had been in themselves an accretion, and which were temporarily settled only with the Proprietors of *Muteor.* Their Lordships think,

* 13, Moore, Indian Appeal Ca., 467.

however, that this distinction cannot prevail. There is evidence from which it may be presumed that those lands accreted to the estate of *Muteor*, and it may be inferred from the mode of accretion that the Government settled with the proprietors upon the ground that they had so accreted, and therefore that he was entitled to the settlement.

On these grounds their Lordships think that the judgment of the High Court must be reversed, and they also think that the decree originally made by the Judge of *Patna* before the remand is the correct decree. They find there is no formal petition of appeal against the decree of the High Court which remanded the suit, but this judgment ought not to be allowed to stand in the way of the proper decree to be made in the cause, and will be nullified by the course their Lordships propose to take, viz., humbly to advise Her Majesty to reverse the judgment of the High Court now under appeal, and the second judgment of the Zillah Judge, and to direct a decree to be made in the suit to the effect of the original decree of the Zillah Judge. The Respondents must pay the costs of the litigation in *India*, and of this appeal.

Attorney for the Appellants: Mr. *T. L. Wilson.*

Attorneys for the Respondents: Messrs. *Henderson.*

BOMBAY HIGH COURT.

The 18th November, 1875.

PRESENT:

Mr. Justice West and Mr. Justice Nanabhai Haridas.

REG. *v.* LAKHYA GOVIND* and another.

Act X. of 1872, *s.* 67—*Jurisdiction.*

Dacoity having been committed in the territory of H. H. the Gayakwad and a part of the stolen property having been found concealed in the British territory, *Held* that a conviction of dacoity could not be sustained, that being a substantive offence completed as soon as perpetrated in the territory of H. H. the Gayakwad; the conviction may be altered to one of retaining stolen property known to have been obtained by dacoity (Penal Code, s. 412), and the sentences upheld.

PER CURIAM.—We do not think the conviction of dacoity can be sustained. That was a substantive offence completed as soon as perpetrated at Velanpor, although, had Velanpor been in British territory, the subsequent acts in the process of taking away the property might, in the legal sense, as they would have the same legal character, have coalesced

* *Vide* 1, Indian Law Reports, Bombay Series, p. 50.

with the first and principal one so as to give jurisdiction under Section 67 of the Code of Criminal Procedure. But we think the conviction may be altered to one of retaining stolen property known to have been obtained by dacoity (Indian Penal Code, Section 412), and the sentences upheld. The retaining is included in the more comprehensive charge viewed as an abstract accusation of an act attended with a certain intent or consciousness, and the conception of dacoity being independent of the place where it was committed suffices to cover what is embraced within it, though the latter was an act done in British territory. The retaining was in British territory; its legal character depended on circumstances the definition of which does not involve a territorial term, though on a question of the liability of any particular person under a combination of them the question of place would for jurisdictional purposes be an essential one.

We accordingly alter the conviction in the case of each prisoner to one under Section 412 of the Indian Penal Code without disturbing the sentences.

CALCUTTA HIGH COURT.

The 5*th July*, 1875.

PRESENT:

Mr. Justice Glover and Mr. Justice Romesh Chunder Mitter.

GUNPUT NARAIN SINGH,* *Petitioner.*

Act VIII. of 1859, *ss.* 92 *and* 93—*Interim Injunction—Suit for specific Performance of Contract to give in Marriage—Hindu Law—Ceremonies of betrothal.*

Sections 92 and 93 of the Code of Civil Procedure do not apply to a suit for specific performance of a contract to give in marriage, and the Court will not grant an interim injunction to restrain the defendant from making another marriage with a third person.

Per GLOVER, J.—A suit for specific performance of a contract to give in marriage will not lie: the remedy is an action for damages for breach of the contract. The ceremony of betrothal does not by Hindu law amount to a binding irrevocable contract of which the Court would give specific performance.

In this case the petitioner instituted a suit for specific performance of a contract by defendant to give her daughter in marriage to petitioner's son and applied for an injunction under s. 93, Act VIII. of 1859, to restrain the defendant from celebrating the marriage of her daughter

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 74.

with any other person than the petitioner's son, until the said suit had been determined. The Judge having refused to grant the application, the petitioner applied to the High Court.

GLOVER, J. (In delivering judgment said):—As a general rule, a decree for specific performance of a contract is given only where an award of damages would be an incomplete relief, and the breach of promise to marry or to give in marriage is one to which a money penalty has in England at least* always been considered adequate. And if the matter is to be settled on the principles of equity and good conscience, it can hardly, I think, be said that the Courts in this country should interfere to enforce a marriage between parties one of whom is unwilling, whilst the other can obtain a money remedy for his disappointment. The authorities which have been quoted in support of the arguments that Hindu law demands the carrying out of a marriage when certain anterior ceremonies have been performed, do not, it seems to me, go farther than to declare it usually wrong to break such engagements.

I have not been able to discover any case like this decided on this side of India† but the question was very fully discussed in the Bombay High Court in the case of *Umed Kika* v. *Nagandas Narotamdas*‡ and it was there decided that the Court would not order specific performance (the girl not being a party to the suit), or compel the father to carry out a marriage with the person to whom the daughter had been betrothed.

The Court also held that a betrothal was not, according to Hindu law, an actual and complete marriage. It was shown in that case that there was no precedent for the contention that specific performance had ever been decreed in cases like the present. The authorities quoted (five cases in all), not going beyond this, that, in case the promise was not carried into effect within a certain limited period, the defendant should pay a certain sum by way of damages.

* In Jogeswar Chakrabati *v.* Panch Kauri Chakrabati, 5, B. L. R, 395, it was held that, on breach of a promise to give in marriage, a suit to recover a sum paid as consideration would lie in the Civil Courts; but see *per* Markby, J; in *Asgar Ali Chowdhry* v. *Mahabut Ali*, 13, B. L. R., App., 34, where the remedy for breach of a contract to give in marriage is discussed.

† See a reference to the point in *Nowbut Singh* v. *Mussamut Sad Kooer*, 5, N. W. P. H. C. Rep., 102.

‡ 7, Bom. H. C. R., O. C., 122.

I quite agree with what the learned Judges of the Bombay High Court say on this point, and the absence of any authority in favor of the petitioner points strongly to the conclusion that such a case as this has never been considered one in which any thing more than a money award of damages should be decreed.'

The case of *Aunjona Dasi* v. *Prahlad Chandra Ghose** does not seem to apply. In that suit it was held that a suit by a Hindu mother to declare the marriage of her daughter with the defendant was null and void would lie in the Civil Court. I was of a contrary opinion at the time; but granting that such a suit will lie, how does that affect the present case? It is not averred by the petitioner that his marriage was ever actually completed.

With regard to the effect of betrothal, the reference made to the Vyavastha Darpana applies to Bengal only; but even there, according to the authorities quoted in vyavastha 386 (p. 646), betrothment is not considered marriage irrevocable; for, as a matter of fact, a girl betrothed to a man, who dies before actual and complete marriage, can afterwards be married to another man, and this seems a complete answer to the allegation.

The judgment of the Bombay High Court refers to the Mitakshara, and that is the law which applies to the case before us. By that law, ch. ii., s. 11, v. 27, retractation of betrothal is punishable by a fine to the king, and may in some cases be made without any penalty, provided good cause be shown, and one, if not the only, good cause, is said to be the coming of a "preferable suitor."

It appears to me, therefore, that as the plaintiff would fail in a suit for specific performance of the marriage (I do not wish to prejudge matters, but that is my opinion), he ought not to obtain an injunction to prevent the girl's guardian making other matrimonial arrangements. I think that the Subordinate Judge was right, and that this application should be refused.

MITTER, J.—Without expressing any opinion upon the question, whether a suit of this nature will lie or not, I also think that this application ought to be refused. I reject it upon the grounds that the matter does not come within the purview of either s. 92 or s. 93 of Act VIII. of 1859; and, if it did, the petitioner should not be allowed to question the order of the lower Court in this form, when he has under the law the right to appeal in a regular way.

Appeal dismissed.

* 6, B. L. R., 243.

CALCUTTA HIGH COURT.

The 5th February, 1867.

PRESENT:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

SUDERUDDEE and ZUMEERUDDEE* (Defendants) *Appellants,*

vs.

WOOMA CHURN CHATTERJEA (Plaintiff) *Respondent.*

Rejected Revenue Survey—Chittahs—Entries of facts—Admissibility in evidence.

The Revenue Survey having been rejected by the Board of Revenue on grounds connected with the scientific accuracy and usefulness of the survey, the entry of facts in the chittahs of that survey was not made at all less valid.

MR. JUSTICE JACKSON.—The special appeal in this case fails.

The Principal Sudder Ameen has found upon the evidence recorded both in the Courts and before the Ameen who made a local enquiry that the tank was the *Bromotur* tank of the plaintiff and a circumstance strongly corroborative of that evidence is that, in the Revenue Survey made more than 20 years ago, the tank is entered as a Bromotur tank in the Government chittahs.

It has been alleged by special appellant that the Revenue Survey has been set aside by the Board of Revenue as incorrect and consequently that the chittahs of that survey are not receivable in evidence. But the rejection of the Revenue Survey as alleged was not on grounds which made the entry of facts, like that now in issue, at all less valid. The Survey was rejected on grounds altogether of a different nature connected entirely with the scientific accuracy and usefulness of the Survey.

The decision of the Lower Appellate Court is affirmed with costs.

Mr. Justice Glover concurred.

HINTS FOR POLICE IN CASES OF VIOLENT DEATH.

In cases of hanging or strangulation.

1. Note, if possible, before cutting down the body, or removing the strangulating medium, any lividity of face, especially of lips and eyelids; any projection of the eyes; the state of the tongue, whether enlarged and protruded, or compressed within the lips; the escape of any fluid from mouth and nostrils, and direction of it flow.

* Case No. 2709 of 1866 (never before reported.)

2. On cutting down the body, or removing the strangulating medium, note particularly the state of the neck, whether bruised along the line of strangulation.

3. Note the direction of the mark, whether circular or oblique.

4. Note the state of the thumbs, whether crossed over the palm.

5. If possible, bring away the materials by which the hanging or strangulation has been effected.

On finding a body in a tank or well.

1. Note any marks of blood about the mouth, or on the sides of the well or tank.

2. On removing the body, carefully examine for, and note any external marks of injury, especially about head and neck.

3. Note state of skin, whether smooth or rough.

4. Examine the hands, and carefully remove anything they may hold.

In the case of a body found murdered in an open field.

1. Note the number, character, and appearance of any injuries.

2. Should a weapon be found, cover with paper, and seal any marks of blood, and especially note and preserve any adherent hairs.

3. In the case of an exposed infant, note the state of the cord, especially if tied, and any marks of violence.

In a case of presumed murder and burial of the remains.

1. Examine for, and note any marks of violence, about the skull especially.

2. Note carefully any indications of sex; especially bring away a jaw and the bones of the pelvis.

3. If any suspicions of poisoning, bring away (sealed) the earth where the stomach would have been.

4. If the body, presumed to have been murdered, has been burned, collect and bring in any fragments of bones which may be found among the ashes.

Questions to be put in cases of poisoning.

1. What interval was there between the last time of eating or drinking and the first appearance of the symptoms of poisoning?

2. What interval was there between the last time of eating or drinking and the death of the person (if this occurred)?

3. Did the person move from the place where the first symptoms were noticed? If so, how far did he go?

4. What were the first symptoms?
5. Did vomiting or purging occur?
6. Did the person become drowsy or fall asleep?
7. Were there any cramps or twitching of the limbs observed, or tingling in the skin or throat complained of?
8. Mention any other symptoms noticed.

SHORT NOTES.

CALCUTTA HIGH COURT.

Purchaser at Sale by Sheriff under Writ of fieri facias—Sale subsequently declared invalid—Suit to recover Purchase-Money—Liability of Execution-Creditor—Jurisdiction—Act VIII. of 1859, *ss.* 207, 242.

The plaint in a suit by A against B stated that, in a suit in which B had recovered judgment against C, a writ of fi. fa. was, on 18th June 1866, issued on the application of B, directing the Sheriff of Calcutta to levy the judgment-debt by seizure, and, if necessary, by sale, of the property of C in Bengal, Behar, and Orissa, or in any other districts which were then annexed or made subject to the Presidency of Fort William in Bengal; that the writ did not authorize the execution thereof against immoveable property in Oudh; that under the writ the Sheriff, acting under instructions from B, seized and put up for sale the right, title, and interest of C in a talook in Oudh, which was purchased by D, to whom the Sheriff executed a bill of sale, and on receipt of the purchase-money paid a portion thereof to B and the balance to C, and put D into possession of the property, and he remained for some time in possession and in receipt of the rents and profits; that, eventually, in proceedings in Oudh, instituted by D for partition of the property purchased by him, the sale was pronounced to be null and void, and was set aside, and D was removed from possession;* and that the plaintiff sued as the executor of D to recover the whole of the purchase-money from B. *Held*, on appeal, affirming the decision of Phear, J., that the plaint disclosed no cause of action: 1st, because a purchaser who, after the execution of the conveyance, is evicted by a title to which the covenants in the conveyance do not extend cannot recover the purchase-money from his vendors; 2nd, because the Sheriff was not the agent of B for the sale of the property, and therefore no privity of

* It did not clearly appear from the plaint in what way or by whom the purchaser was evicted.

contract existed between B and D; 3rd, because D having been for some time in possession of the property and in receipt of the profits thereof, there had not been a total failure of consideration, and the plaintiff accordingly could not maintain the action in its present shape, viz., for money had and received.

The judgment of the High Court in *Biseswar Lall Sahoo* v. *Ramtuhul Singh*,* explained by Phear, J., and ss. 201 and 242 of Act VIII. of 1859 observed upon.

Vide 1, Indian Law Reports, Calcutta Series, p. 55, (Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby)—The 4th, 5th and 23rd August 1875.—Dorab Ally Khan *vs.* Khajah Moheeooddeen.

Small Cause Court, Calcutta, Constitution of—Act IX. of 1850 *and Act XXVI. of* 1864—*Writ of Habeas Corpus, Return to—Privilege from Arrest—Witness—Undertaking by Prisoner not to sue.*

The Small Cause Court in the Presidency town is not a Court of co-ordinate jurisdiction with the High Court, but a Court of inferior jurisdiction and subject to the order and control of the High Court. Therefore, where on a prisoner being brought up to the High Court on a writ of habeas corpus ad subjiciendum, the return of the jailor stated that the prisoner was detained under a warrant of arrest issued in execution of a decree of the Small Cause Court, *Held,* that the return was not conclusive, but the prisoner was entitled to show by affidavit that he was privileged from arrest at the time he was taken into custody.

Held, also, that on the facts shown in the affidavit the prisoner was privileged at the time of his arrest.

The prisoner was required before his discharge to give an undertaking that he would bring no action for damages for illegal arrest or false imprisonment against the Judges of the Small Cause Court, the bailiff, the jailor, or the judgment-creditor.

Vide 1, Indian Law Reports, Calcutta Series, p. 78. (Mr. Justice Phear). The 9th September 1875—Omritolall Dey.

Jurisdiction—Suit for Land—Letters Patent, 1865, *cl.* 12.—*Injunction.*

In a suit brought against the owners of a mine adjacent to a mine belonging to the plaintiffs, the plaint alleged that a certain boundary line existed between the two mines, and prayed for a declaration that the boundary line was as alleged, and that the defendants might be res-

* 11, B. L. R., 121.

trained by injunction from working their mine within a certain distance from such boundary line. The defendants in their written statement disputed the plaintiff's allegation as to the course of the boundary line. The mines were situated out of the jurisdiction of the High Court, but both the plaintiffs and defendants were personally subject to the jurisdiction. *Held,* that the suit was a suit for land within cl. 12 of the Letters Patent, and therefore one which, the land being in the mofussil, the Court had no jurisdiction to try.

On the facts stated in the plaint and before the filing of the defendants' written statement, the Court granted an *interim* injunction, and refused an application to take the plaint off the file.

Vide 1, Indian Law Reports, Calcutta Series, p. 95. (Phear, J.)—The 20th, 24th and 28th September 1875.—The East Indian Railway Company *vs.* The Bengal Coal Company.

HIGH COURT—N. W. P.

Hindu Law—Inheritance—Act I. of 1872, *s.* 108—*Act XVIII. of* 1872, *s.* 9—*Missing Person—Presumption of Death—Burden of Proof—Act VI. of* 1871, *s.* 24.

The reversioners next after J. to the estate of S. deceased sued to avoid an alienation of S.'s estate affecting their reversionary right made by his widow. J. had not been heard of for eight or nine years, and there was no proof of his being alive. *Held* that his death might be presumed under the provisions of s. 108, Act I. of 1872, for the purposes of the suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the Hindu law of succession prescribed when a person is missing and not dead.

Vide 1, Indian Law Reports, Allahabad Series, p. 53. (Full Bench, Turner, Offg. C. J., and Pearson, J., Spankie, J., and Oldfield, J.) The 22nd August 1875. Parmeshar Rai.

Mahomedan Law—Inheritance—Minor.

Two of the widows of a deceased Muhammadan sold a portion of his real estate to satisfy decrees obtained by creditors of the deceased against them as his representatives. The sale-deed was executed by them on behalf of the plaintiff, a daughter of the deceased, she being a minor, in the assumed character of her guardians.

Held, if the plaintiff was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, she could not be bound by the decrees nor by the sale subsequently effected, and she was entitled to recover her share, but subject to the

payment by her of her share of the debts for the satisfaction of which the sale was effected.

Vide 1, Indian Law Reports, Allahabad Series, p. 57. (Full Bench, Turner, Offg C. J., and Pearson J., Spankie J., and Oldfield, J.)—The 27th August 1875.—Hamir Singh.

BOMBAY HIGH COURT.

Bond—Error in Account—Waiver—Estoppel—Indorsement—Receipt—Evidence of payment.

Where the defendant executed to the plaintiff a bond for the payment of the balance found to be due from the defendant to the plaintiff upon an adjustment of the account of their mutual dealings, which bond contained the following stipulation; "I shall pay the money after causing the payment to be entered on the back of this bond or after taking a receipt for the same. I shall not lay any claim to any payment made except in this way."

Held that, though the defendant at the time of the adjustment disputed the correctness of the account, yet that by having executed the bond and made payments under it, he must be held to have waived his objection, and in a suit on the bond could not be permitted to re-open the question of the correctness of the balance, though he might possibly have been allowed to do so had he alleged that he had discovered errors in the account after the execution of the bond, and had he specified some of the alleged errors.

Held also that the stipulation in the bond could not be permitted to control Courts of justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments; and the Anglo-Indian law of evidence not excluding oral evidence of payments, it would be against good conscience and the policy of the law to reject it, though the absence of indorsements is a circumstance of some importance, which ought not to be overlooked, but is by no means conclusive.

Bekana Tatiah v. *Vasuntum Chinna* (Mad. S. D. A. Rep. for 1855, pp. 49 and 50) impeached; *Sashachellum Chetty* v. *Govindappa* (5, Mad. H. C. Rep., 451), *Kashináth Balal Oka* v. *Narria Jan* (Bom. Sp. Ap. 438 of 1872), and *Nugur Mull* v. *Azeemoollah* (1, N. W. P. H. C. Rep. 146,) approved.

Vide 1, Indian Law Reports, Bombay Series, p. 45. (Westropp, C. J., and Kemball, J.) The 14th October 1875. Narayan Undir Patil *v.* Motilal Ramdas.

Act XVIII. of 1854, *Section* 17—*Act XXV. of* 1871, *Section* 2—*Railway-Company—Ticket—Trespass.*

The plaintiff entered a carriage on the defendants' railway at Surat with the purpose of proceeding to Bombay. By an oversight, and without any fraudulent intent, he omitted to procure a ticket at Surat. On arriving at Nowsari, he applied to the station master for a ticket to Bombay, but was refused; he was however allowed by the defendants' servants to proceed in the same train to Balsar, where he again applied for a ticket and was again refused, but was directed by the defendants' servants to get into the train and not leave it again. At Dhandu he again got out and applied for a ticket to the station master. During a discussion between the plaintiff's master and the station master, the plaintiff, at the direction of his master, re-entered the train. Ultimately the station master refused to give the plaintiff a ticket, and ordered him to get out of the train; and on his not complying with his order, sent a sepoy, who forcibly removed the plaintiff from the carriage. In an action by the plaintiff to recover damages for the forcible and illegal removal of the plaintiff from the carriage, and for the illegal detention of the plaintiff at the station at Dhandu, and for illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay.

Held, 1st, that the latter portion of Section 2 of Act XXV. of 1871, amending Section 1 of Act XVIII. of 1854, which provides for payments to be made by persons failing to produce their tickets when demanded by the servants of the Company, applies only to the case of a person who has received a ticket, and will not or can not produce it, and not to a person travelling without having obtained a ticket with no intention to defraud;

2nd.—That the absence of a fraudulent intention did not make the entry into the carriage less unlawful, and consequently that the plaintiff started from Surat as a trespasser;

3rd.—That the conduct of the railway officials at the stations intermediate between Surat and Dhandu, if it amounted at all to leave and license to the plaintiff to proceed without a ticket, could only operate as such until the train stopped at the next station;

4th.—That there was no legal obligation on the station master to issue a ticket to the plaintiff to enable him to proceed from Dhandu.

Vide 1, Indian Law Reports, Bombay Series, p. 52. (Westropp, C. J., and Sargent, J.) The 27th November 1875—Pratab Daji.

EARLY STRUGGLES OF EMINENT LAWYERS.*

"Parts and Poverty," said Lord Chancellor Talbot, "are the only things needed by the law student." "Pray, my lord," asked a fashionable lady, of Lord Kenyon, "what do you think my son had better do, in order to succeed in the law."—"Let him spend all his money, marry a rich wife, spend all hers, and when he has not got a shilling in the world, let him attack the law." Such was the advice of the old chief justice.

Such sentiments as these it has been the fashion to laud. In themselves they are true, but they are only half-truths—or, perhaps, we should rather say, they are the precise converse of great errors. A wealthy man is less likely to make a good lawyer, than a man who is not rich, just as we are told he is less likely to inherit eternal life. An individual who "has every thing handsome about him," on whom fortune has abundantly showered her gifts, and to whom pleasure offers her thousand inducements, is assuredly not the most likely, nay, is just the least likely person, with Sir William Blackstone, to

> "—— welcome business, welcome strife,
> Welcome the cares, the thorns of life;
> The visage wan, the pur-blind sight,
> The toil by day, the lamp by night."

So he is the more likely to tread "the primrose path of dalliance," than "the steep and thorny way to heaven."

It may be questioned whether poverty, and the difficulties which so often beset men in their passage through life, have all the beneficial influence which is ascribed to them. The school of adversity as often indurates as softens the affections of mankind. In many minds, instead of producing humility and industry, it produces only disgust and indifference. Again, looking particularly to our profession, it may be doubted whether poverty has not, in many cases, the effect of distracting the attention from professional subjects. When the unfortunate Donald, the author of "Vimonda," was asked how he was getting on with his tragedy, he replied, in a tone of indescribable sorrow, "Talk not to me of my tragedy—I have more tragedy than I can bear at home." With a family reduced almost to starvation, we could hardly expect his mind to have been devoted to his noble subject.

Lord Erskine said that the first time he addressed the court, he was so overcome with confusion, that he was about to sit down. "At

* 1, Law and Lawyers, p. 48.

that time," he added, "I fancied I could feel my little children tugging at my gown, so I made an effort—went on, and—succeeded." With a man of less sanguine temperament, the same feeling would have only added to his confusion—the conviction that, upon his success at that time, depended the future welfare of those he loved, would only have aggravated the embarrassment of his novel situation.

About thirty years ago, a young man, a scion of a respectable family, came up to London to prepare himself for the bar. His means were small, but his wants were limited, and well aware that if fortune does not always favor the deserving, she has, for the ignorant and dissolute, no honors or rewards, he applied himself with zeal and industry to the study of his profession. Nature had blessed him with an acute mind—his perseverance was untiring, and he could boast that pleasure never allured him from the paths of duty. He was, in due time, admitted to the honors of the wig and gown, and took his seat on the back benches in the Court of King's Bench. His prospects were, at first, promising—his family connections—the reputation he had acquired, during his pupilage, for attention and industry, obtained for him, earlier than usual, a small practice, and what leads to its increase, a good name. Elated by the prospects which appeared opening before him, he married—and he was yet in the prime of life when he was the father of a large family. Unhappily, his business did not increase in the same ratio with his necessities, and he soon began to feel all the difficulties which attend on small supplies and large demands. His physical strength began to fail him, and all the more, when he saw his admirable wife, whom he loved with all the ardor of a first affection, devoting herself to the most menial tasks—discharging the humblest offices for him and their children. On her fragile frame, care and sorrow made rapid inroads. A casual attack of illness, aggravated by pecuniary distress, threatened her life, and, ultimately, she died—falling a victim to her anxieties for her husband and family. Heart-broken, the young lawyer still struggled on for the sake of his children. A few months after the partner of his cares was consigned to the grave, he succeeded in some important cause accidentally intrusted to him: business poured in on him; and, in a very short time, he found himself one of the leaders of the bar. When a friend congratulated him on his sudden promotion, he exclaimed—"Had it but come a few months sooner!"

Reader! this is a true story, as many can vouch: the subject of it now occupies a high place amongst our legal functionaries.

Fletcher Norton* toiled through the routine of circuits and Westminster Hall for many years, without a brief. Mr. Bearcroft, one of the most eminent barristers of the last century, and who died Chief Justice of Chester, underwent the severest difficulties in his passage to wealth and fame. His industry and perseverance were indomitable. For many years his practice was so limited as hardly to suffer him to subsist with the strictest economy. He sometimes, however, thought of relinquishing the law as a profession, but a just estimation of his own acquirements induced him to continue, and he at last made himself known, and obtained an immense practice and a high reputation. It was a long time before the eminent merits of Mr. Holroyd, afterwards a puisne judge in the King's Bench became recognised. Lord Kenyon spoke of him when in his forty-seventh year, as "a rising young man." Sir William Grant travelled many a circuit before he obtained a single brief, and at last owed to the friendship of a minister, what he was entitled to expect from his own merits.

The rise of Sir Edmund Saunders, one of our soundest lawyers, from the very depths of poverty to the chief justiceship of Common Pleas, is one of the most remarkable circumstances in our legal annals. Saunders was originally, if not a parish foundling, at least, a poor beggar boy; and by constant attendance in Clements Inn, obtained the notice of the attorneys' clerks. Finding he was anxious to learn to write, some benevolent attorney had a sort of mock desk constructed for him at a window on the top of a staircase, where he sat and wrote after copies of court and other hands lent him by the clerks. In this he soon became so expert, that he used to obtain employment as a copier, and made some little money in this way. Some books of forms having been lent him, he became "an exquisite entering clerk," and then acquired a knowledge of special pleading. He at last obtained some assistance, which enabled him to be called to the bar, and he acquired a practice in the King's Bench equal to any other lawyer of his day. We are sorry

* With Sir Fletcher Norton, as with many others, "Early Struggles" appeared to have, in some measure, operated injuriously. To them might be ascribed the parsimony and avarice for which he was distinguished in after years, and which obtained for him the elegant appellation of Sir Bullface Doublefee. Lord Orford mentions an instance of his *amor pecuniæ*, which deserves to be extracted. "His mother lived at a mighty shabby house at Preston, which Sir Fletcher began to think not quite suitable to the dignity of one who had the honor of being his parent; he cheapened a better, in which were two pictures, valued at £60. The attorney insisted on having them as fixtures for nothing: the landlord refused—the bargain was broken off—and the dowager madam remains in her original hut."

to be compelled to add, he was in his habits grossly intemperate—" for, to say nothing of brandy, he was seldom without a pot of ale at his nose or near him. By this means the became corpulent and gross in his habit of body, so much so as to be offensive to the Bench, and every one near him. Sir Matthew Hale appears to have disliked him on account of his ill-life, and also on account of his habit of attempting to deceive the court by tricks and subterfuges. To this latter practice he was much addicted, and he appeared to think his zeal for his client justified him in pursuing it. He was witty and good tempered, and was often seen in court before the judge had arrived, surrounded with students, putting cases to them and debating law points with a familiarity that bespoke native goodness of heart. When at the bar, although in enormous practice, he lodged with a tailor, in Butcher's Row, an abode in which he continued after he was raised to the Bench. This elevation he owed to the ability he had manifested when counsel for the crown on several occasions; but it was the cause of his death, from its imposing upon him very severe labors, and the necessity of changing his diet and habits.

PRIVY COUNCIL.

The 22nd and 23rd April; and 16th May, 1874.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir James Hannen.

On appeal from the Appellate Court of Malta.

COUNT G. F. SANT,* BARON OF CASSIA (Appellant)

versus

THE COUNTESS GENEROSA, the WIFE of COUNT SANT (Respondent.)

Judicial Separation—Ill-Treatment of Child-equivalent to Ill-Treatment of Parent—Affirmative and Negative Evidence.

Under the words "*ingiurie gravi*" in the 46th Article of the Maltese law relating to the separation of married persons, it was intended to leave a large discretion to the tribunal having to judge of the facts. Not only acts but words designed to wound the feelings of the wife may amount to "*ingiurie gravi*", and in considering whether they do so, the position of the parties and the habits and usages of the society in which they live must be regarded. Insults offered to the wife which manifest contempt of her in that character are of special gravity, especially if offered in the presence of others; and wrongs of this description are not to be estimated separately, but in combination one with another.

* *Vide* Law Reports, Privy Council Appeals, Vol. V., p. 542.

Where a husband habitually treated his wife with harshness and insult, and thereby kept her in a constant state of excitement and fear, and also, upon a trifling pretext, used personal violence to their adult daughter, by which her health was affected during several months:—

Held, that the violence offered to the daughter must be taken in conjunction with the previous treatment of the mother, and that together they constituted "*ingiurie gravi*" within the meaning of the 46th Article.

Where a father ill-treated his daughter in such a manner as to afford to his wife a ground, under the Maltese law, for demanding separation from him, but the wife remained in his house for several months, during which the daughter continued to suffer from the consequences of the ill-treatment, and required the attention of her mother; and the wife quitted her husband's house on the first occasion of his leaving home:—

Held, that the matrimonial offences of the husband had not been condoned.

The testimony of witnesses deposing to what they saw and heard is of more value than that of persons who, from the necessity of the case, are only able to state that they did not see or hear similar conduct and words.

SIR JAMES HANNEN (In delivering judgment said):—Their Lordships consider that, under the words "*ingiurie gravi*," it was intended to leave a large discretion to the tribunal having to judge of the facts; that not only acts but words designed to wound the feelings of the wife—whereas in this case, she is the complaining party—may amount to "*ingiurie gravi*"; that, in considering this question, the position of the parties, the habits and usages of the society in which they live, must be regarded; that insults offered to the wife, which manifest contempt of her in that character, are of special gravity, and that that gravity is increased if the insults be offered in the presence of others; that wrongs of this description are not to be estimated separately, but in combination one with another.

Having considered the principles applicable to the case, the facts may be briefly stated as follows:—

The parties were married on the 31st of August, 1830, and have had five children. They were both of high rank, the Appellant being noble, and the lady of equal birth. They appear to have been in somewhat straitened circumstances for their position in society.

There is nothing in the evidence to shew that their early married life was not happy; and all the witnesses who were called to establish the charge of cruelty against the Count speak chiefly as to events of the four or five years preceding the separation.

One witness (*Nicola Ferrugia*) called by the Count gave evidence from which it would appear that, as long ago as 1849, the Appellant used threatening and insulting language towards his wife: "One day the Count, taking a plate in his hand, said to the Countess, threatening

her, 'If you speak, I will break your head with this plate. Your income is not enough for your slippers.'" But, whether this be regarded as an isolated outburst of temper or as indicative of his habitual behaviour, it appears from the general tenor of the evidence of the witnesses called on behalf of the Countess, that the conduct of her husband towards her, and one at least of her children, had assumed a more serious character about the year 1866: "Once, four or five years ago," says the witness *Elena Bonatto*, in her examination taken in May, 1870, "I approached Miss *Angelica*, and, finding her crying, she told me that she had got a slap in the face."

Lorenzo Vella, couchman to the Count's father, speaking of the general behaviour of the Count when he came with his family to visit his father during the nine years which preceded 1864, says, "When the Count came, he got angry with everyone, also with his father. The Count Francesco used to threaten every one. There was no reason for it. He used to call the wife and children 'carrion', but not his father. He spoke so whilst irritated, because everything irritated him."

Maria Bonello, also in the service of the Count's father, says, "When he came he scolded the lady. Once, five years ago, the Count came about 10 P. M. I heard him cry out. I heard from his lady, who was crying, that he was scolding her because she had gone out to church. He continued scolding till about midnight, and returned to town at night-time."

The principal evidence offered on behalf of the Countess is that of servants living in the house.

Lorenzo Camilleri, who lived eleven years in the family, says, "The lady was treated badly; he swore at the lady, and at the children also, in a passion. There was no cause for the anger. I sought to get away, not to hear the bad words. The last quarrel took place about two years or twenty months ago (*i. e.*, in 1868). The Count said, 'It will end badly, we shall finish badly;' and sometimes he said, 'On account of yourselves I shall go to the gallows.'"

He also states that the Count, in the presence of his family, used profane language in depreciation of matrimony, and continued, "Some months before I left the Count's house I heard him say, 'I raised you from the mud, your income does not serve me for tooth-picks.' Oftentimes I have seen the wife in tears, also the children. When the Count knocked at the door the family got timid. The Count at times used the word 'carrion' (*carogna*) to his wife."

He also states that the Count used to apply a grossly obscene term of abuse to his wife.

Elena Bonatto, more than nine years a servant of the parties, states that the Count used towards the lady the expression " carrion," that he threatened in gross terms to kick her, that he threatened to turn her out of the house, that sometimes the reason was some mistake of the witness herself in serving the dinner, that the Countess was often weeping, that the Count cursed and swore and used improper words before the children, as well as before their mother, and particularly that he used with reference to his wife, and in her presence, language of the most disgusting indecency, too gross to be here repeated.

Margarita Ferrugia, a servant in the house for two years and a half before the Countess left, deposed that the Count threatened to kick his wife, and to throw her out of the window ; and on one occasion, when the lady was in bed, he threatened to throw her out with her chemise on, and to kill her ; that after this, from 3 o'clock in the morning till 6, he took to walking about, swearing, cursing, and grumbling, from the lady's room to his own. " At last he remained in his room." " During my stay," the witness continues, " their house was a hell. He used to say to the lady she was good for nothing ; that he had raised her from the dirt. He swore by the Virgin Mary. A day did not pass without some quarrel. He used to say that he would be sent to the gallows on her account."

This witness also corroborated the last as to the use by the Count of the obscene and insulting language to the Countess already referred to. " He did not call her by name, but would say, ' I say, come here,' and call her a sow and brood-hen. These words he used openly at dinner before the children and servants."

No suggestion of a reason was offered why these witnesses should not be believed, except the antecedent improbability that a gentleman should be guilty of such conduct to his wife ; but the length of time they were in the service of the Count is a testimony to the general goodness of their character, and no questions were put to them in cross-examination with a view of shaking their credibility.

On the other hand, their statements were corroborated in some important particulars by the evidence of *Dr. Mifsud,* the medical attendant of the family. He says, " I observed that he, the Count, is of a hard disposition. The father is of an irascible character, in consequence whereof, when he is under some impulse, he does not pay any respect

to the state of illness of the wife and of the family. If at any time some family dispute arises with the servants, or something similar, he gets into a passion and utters some injurious word even in the sick room; words addressed to the servants and sometimes to the wife, momentarily aggravating the state of the sick person. For example, the words used were that the position of the wife depended on her title as Countess, and speaking with contempt of her family. I also heard him swearing as if using familiar expressions. The words were uttered in a loud voice audible to the family. I also attended the Count sometimes, but his irascibility surmounted his indisposition," probably meaning that his illness did not prevent his outbursts of temper. "I do not remember injurious words in presence of the lady, but there were such words said to me in regard to her. I always observed the exasperated state of the Count. I told the Count to repress his irritation; he used to say, 'I cannot.'"

Their Lordships are of opinion that the evidence of these witnesses outweighs the testimony of those persons who were called on behalf of the Count.

Some of these, indeed, gave evidence rather tending to support the charges made against the Count. The evidence of *Nicola Ferrugia* has already been referred to. Another, *Camilleri*, had only been in the Count's service a month when the Countess left; but he, while stating that he saw no blows and heard no bad language, says that when the lady and family used to retire, the Count remained to grumble, and swore against those who had caused him to marry.

The other witnesses called by the Count were either men servants (such as the game-keeper and coachman), not having the same opportunities of observing his behaviour as those called by the Countess, or acquaintances, before whom, on the rare occasions on which they saw him, it may well be that he restrained his passion, while in the privacy of his home he may have permitted it to carry him to the excesses deposed to by the domestic servants and *Dr. Mifsud*. Even if the weight of evidence on the one side and the other were more equally balanced than it is, their Lordships would not lightly set aside, on a question of fact, the finding of the tribunal which had an opportunity of hearing the witnesses and observing their demeanour; but without these advantages their Lordships think that the testimony of the witnesses deposing to what they saw and heard is of more value than that of persons who, from the

necessity of the case, are only able to state that they did not see or hear similar conduct and words.

The result is, that their Lordships come to the conclusion that the Count, for some years before his wife left her home, had been accustomed to treat her with harshness and unkindness, and that he frequently insulted her in the grossest manner before her servants and children, and intentionally wounded her feelings as a mother and a woman by applying to her terms of the foulest vituperation, and that he thereby kept her in a constant state of excitement and fear, which could not but be prejudicial to her health.

This being the general condition of the household, it was proved, and not denied, that in November, 1868, the Count gave his daughter *Angelica,* a woman of thirty, some slaps in the face, he alleging that the only provocation she had given was that she contradicted him.

It was also proved by *Dr. Mifsud* that the effect of these blows, acting on the already delicate health of the daughter, was to throw her into convulsions, which continued to return during several months, and that the lady and all the family from the time of this occurrence were in fear of the Count.

Their Lordships are of opinion that this violence offered to the daughter must be taken in conjunction with the previous treatment of the mother, and that together they constitute "*ingiurie gravi*" within the meaning of the 46th Article.

It was, however, argued that the Countess, by not leaving her husband before February, 1869, condoned his matrimonial offences. Their Lordships are of opinion, however, that this defence is not established. It appears that *Angelica* remained ill from the consequences of her father's violence for several months, during which she required the attention of her mother, and it further appears that on the first occasion of the Count leaving home the lady took advantage of the opportunity to escape from the house.

Their Lordships will, therefore, humbly recommend to Her Majesty that the judgment of the Court of Appeal of *Malta* of the 22nd of April, 1872, be affirmed, and that this appeal be dismissed with costs.

PRINCIPLES OF CIVIL LAW.

Of all the objects of study, civil law is that which has the least attraction for those who do not study jurisprudence as a profession. But this is not saying enough. In fact, it inspires a kind of terror. But a slight reflection might convince them that this subject is of vast importance to them, as it treats of every thing that is most interesting to them, of their security, of their property, of their mutual and daily transactions, of their domestic condition, in the relations of father, of children, of husband, and of wife. Here it is that *rights* and *obligations* spring up; for all the objects of law may be reduced, without mystery, to these two terms.

The civil law is, in fact, only another aspect of the penal law; one cannot be understood without the other. To establish *rights*, is to grant permissions; it is to make prohibitions; it is, in one word, to create offences. To commit a private offence is to violate an obligation which we owe to an individual,—a right which he has in regard to us. To commit a public offence is to violate an obligation which we owe to the public,—a right which the public has in regard to us. Civil law, then, is only penal law viewed under another aspect. If we consider a law at the moment when it confers a right, or imposes an obligation, this is the civil point of view. If we consider a law in its sanction, in its effects as regards the violation of that right, the breaking through that obligation, that is the penal point of view.

What is to be understood by *principles of civil law?* They are the *motives* of laws; the knowledge of the true *reasons* which ought to guide the legislator in the distribution of the rights which he confers, and the obligations which he imposes.

All the objects which the legislator is called upon to distribute among the members of the community may be reduced to two classes:—

1st. *Rights.*

2nd. *Obligations.*

Rights are in themselves advantages, benefits, for him who enjoys them. Obligations, on the contrary, are duties, charges, onerous to him who ought to fulfil them.

Rights and obligations, though distinct and opposite in their nature, are simultaneous in their origin, and inseparable in their existence. In the nature of things, the law cannot grant a benefit to one without imposing, at the same time, some burden upon another; or, in other

words, it is not possible to create a right in favor of one, except by creating a corresponding obligation imposed upon another. How confer upon me the right of property in a piece of land? By imposing upon all others an obligation not to touch its produce. How confer upon me a right of command? By imposing upon a district, or a number of persons, the obligation to obey me.

The legislator ought to confer rights with pleasure since they are in themselves a good; he ought to impose obligations with reluctance, since they are in themselves an evil. According to the principle of utility, he ought never to impose a burden except for the purpose of conferring a benefit of a clearly greater value.

By creating obligations, the law to the same extent trenches upon liberty. It converts into offences acts which would otherwise be permitted and unpunishable. The law creates an offence either by a positive command or by a prohibition.

These retrenchments of liberty are inevitable. It is impossible to create rights, to impose obligations, to protect the person, life, reputation, property, subsistence, liberty itself, except at the expense of liberty.

But every restriction imposed upon liberty is subject to be followed by a natural sentiment of pain, greater or less; and that independently of an infinite variety of inconveniences and sufferings, which may result from the particular manner of this restriction. It follows, then, that no restriction ought to be imposed, no power conferred, no coercive law sanctioned, without a sufficient and specific reason. There is always a reason against every coercive law—a reason which, in default of any opposing reason, will always be sufficient in itself; and that reason is, that such a law is an attack upon liberty. He who proposes a coercive law ought to be ready to prove, not only that there is a specific reason in favor of it, but that this reason is of more weight than the general reason against every such law.

The proposition that every law is contrary to liberty, though as clear as evidence can make it, is not generally acknowledged. On the contrary, those among the friends of liberty who are more ardent than enlightened, make it a duty of conscience to combat this truth. And how? They pervert language; they refuse to employ the word *liberty* in its common acceptation; they speak a tongue peculiar to themselves. This is the definition they give of liberty: *Liberty consists in the right of doing everything which is not injurious to another.* But is this the

ordinary sense of the word? Is not the liberty to do evil liberty? If not, what is it? What word can we use in speaking of it? Do we not say that it is necessary to take away liberty from idiots and bad men, because they abuse it?

According to this definition, we can never know whether we have the liberty to do an action until we have examined all its consequences. If it seems to us injurious to a single individual, even though the law permit it, or perhaps command it, we should not be at liberty to do it. An officer of justice would not be at liberty to punish a robber, unless, indeed, he were sure that this punishment could not hurt the robber! Such are the absurdities which this definition implies.

What does simple reason tell us! Let us attempt to establish a series of true propositions on this subject.

The only object of government ought to be the greatest possible happiness of the community.

The happiness of an individual is increased in proportion as his sufferings are lighter and fewer, and his enjoyments greater and more numerous.

The care of his enjoyments ought to be left almost entirely to the individual. The principal function of government is to guard against pains.

It fulfils this object by creating rights, which it confers upon individuals: rights of personal security, rights of protection for honor, rights of property, rights of receiving aid in case of need. To these rights correspond offences of different kinds. The law cannot create rights except by creating corresponding obligations. It cannot create rights and obligations without creating offences. It cannot command nor forbid without restraining the liberty of individuals.

It appears, then, that the citizen cannot acquire rights except by sacrificing a part of his liberty. But even under a bad government there is no proportion between the acquisition and the sacrifice. Government approaches to perfection in proportion as the sacrifice is less and acquisition more.

CALCUTTA HIGH COURT.

The 15*th June,* 1875.

PRESENT:

Mr. Justice Markby and Mr. Justice Morris, *Judges.*

MAHOMED ARSAD CHOWDRY* *(a Defendant,)*

vs.

YAKOOB ALLY, *(Plaintiff.)*

Limitation—Minor, Purchaser from—Representative—Act IX. of 1871, *s.* 7—*Act XIV. of* 1859, *s.* 11.

Whatever may have been the effect of s. 11 of Act XIV. of 1859, as to extending the privilege given to a minor to his representative, s. 7, the corresponding section of Act IX. of 1871, limits the privileges to the minor himself and his representive after his death ; and therefore a purchaser from a minor cannot claim the benefit of that section.

This was a suit for recovering possession of an elephant or its value and damages. The plaintiff made his claim on the allegation that the elephant at first belonged to Nowab Ali Chowdry, upon whose death in F. S. 1274 (1866-67), it devolved upon his wife (the third defendant), who was then a minor; that in the same year, on the 2nd of Magh (22nd January 1867), the first defendant, Mahomed Arsad Chowdry, wrongfully took possession of the animal and that the third defendant, on attaining her majority in F. S. 1280 (1873), sold it to the plaintiff, who, on the 25th of June 1874, instituted the present suit for the recovery thereof.

MARKBY, J. (After stating the facts of the case said) :—The date when the elephant was taken out of the possession of the then owner, was the 2nd Maugh 1274 (22nd January 1867). And whatever be the exact nature of the cause of action which is put forward in this suit on the part of the plaintiff, it is admitted that the suit would be barred by the law of limitation, unless the plaintiff can bring himself within the provisions of s. 7, Act IX. of 1871.

It is not contended that the plaintiff himself is a minor, but he seeks to take benefit of that section as purchaser from a person who was a minor when this cause of action accrued. He is in fact the purchaser of the minor's claim to the elephant, and of her claim to damages on account of the elephant having been taken out of her possession. Now by

* *Vide* 15, B. L. R., p. 357.

s. 4 of the Limitation Act (Act IX. of 1871), every suit must be brought within the time specified in the schedule, unless there is something in the provisions in s. 5 to 26 of the Act itself, which absolves the plaintiff from that necessity.

It is not a question therefore, as is argued before us, whether by the words of s. 7 the purchaser from the minor is excluded, but whether he can bring himself within the provisions of that section. The general words of s. 4 are sufficient to exclude him unless he can do this. Now, the first part of the section says :—" If a person entitled to sue, be at the time the right to sue accrued, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased, or (while he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed."

That is a right clearly personal and restricted to the minor himself. Then the third clause goes on to say :—" When his (the minor's) disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule."

The minor, therefore, or his representative in interest after his death, has a special period allotted to him for bringing the suit. There are no words whatsoever in s. 7, which would give to any other person, in whatever way he might happen to be connected with the minor, any other period for bringing the suit than that specified for ordinary persons. That this is the true construction of this section also appears to be clear, if we compare the words of s. 7 of the present Limitation Act with the words of s. 11 of Act XIV. of 1859. There the words are " If at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time, &c."

There is nothing there which in express terms limits the term " representative" to a representative at the death of the minor. Whether upon the true construction of s. 11 the word " representative" can be extended so as to include a purchaser from the minor suing in his life-time, is a matter which of course we are not at present concerned to consider. No case has been shown to us, in which that section has been so extended. But, however that may be, it seems clear that

the intention of the Legislature was to make the language of the new Act more strict than the language of the old Act, and to limit the advantage of that section to the minor himself and to his representative after his death.

Some argument was addressed to us as to the improbability of the Legislature debarring the purchaser from a minor from any advantage which the minor himself might have. That is not a matter which can in any way enter into consideration of the construction of a section, the language of which is not in any way ambiguous. But so far as this particular case is concerned, I think we may fairly say that we have no hesitation whatsoever in applying the law of limitation to the claim of the plaintiff. The claim is one which we should by no means encourage, even supposing we do not go so far as to hold that it is one which is contrary to the policy of the law, and therefore void. It is quite clear that it was a purchase of a very speculative kind, and it is by no means improbable that, what is really meant to be tried under the allegation of this purchase, is some ulterior claim to more substantial part of the property of the minor. Therefore upon this ground of limitation alone, and without entering into any other portion of the case, we hold that the claim of the plaintiff is barred. But as there is a possibility of further litigation, we think it right to add that we express no opinion whatsoever whether the facts have been rightly found by the Court below. On the contrary, we feel bound to say that the investigation of facts in this case has not been in our opinion by any means satisfactory.

The judgment of the lower Court is reversed, and the suit dismissed with costs in this Court and in the Court below.

An Instance of Cross-Examination.—*Q.*—"How many knaves do you suppose live in this street besides yourself ?" *A.*—"Besides myself ! do you mean to insult me ?" "Well then, how many do you reckon including yourself ?"

An Account of a Celebrated Judge.—A late celebrated judge, who stooped very much when walking had a stone thrown at him one day, which fortunately passed over him without hitting him. Turning to his friend, he remarked "Had I been an upright judge this might have caused my death."

PRIVY COUNCIL.

The 1st, 2nd and 22nd June, 1875.

PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

On appeal from the High Court of Judicature at Madras.

SADASIVA PILLAI* (*Plaintiff*)

vs.

RAMALINGA PILLAI, (*Defendant.*)

Act XXIII. of 1861, *s.* 11—*Execution—Mesne Profits and Interest—Estoppel.*

In construing the provisions of s. 11, Act XXIII. of 1861, notwithstanding certain earlier decisions to a contrary effect, all the Indian High Courts have now recognized it to be settled law that, where the decree is silent touching interest, or mesne profits, subsequent to the institution of the suit, the Court executing the decree cannot, under the section in question, assess or give execution for such interest or mesne profits, but that the plaintiff is at liberty to assert his rights thereto by a separate suit.

The Judicial Committee of the Privy Council, although of opinion that, if the matter had been *res integra*, the provisions of the section might have admitted of a different interpretation, being unwilling to run counter to a long and concurrent course of decisions of the Indian Courts in what is really a mere matter of procedure, accepted this construction of the law as binding.

The plaintiff obtained a decree for the possession of certain lands, with mesne profits up to the date of suit. No claim was made in the plaint for mesne profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the defendant, execution was from time to time stayed by the Court on the defendant giving security, to abide the event of the appeal, for the execution of the decree, and for payment of the mesne profits accruing, while the plaintiff remained out of possession. The decree having been confirmed on appeal, the plaintiff applied for execution in respect of the interim mesne profits.

Held in the Court below that, as these were not provided for by the decree, they could not, under s. 11, Act XXIII. of 1861, be awarded in execution, but must be made the subject of a separate suit.

Held by the Judicial Committee that the proceedings whereby the defendant led the Court to stay execution and continue him in possession, laid him under an obligation to account in the suit for the mesne profits which he engaged to pay; and that this obligation was capable of being enforced by proceedings in execution, notwithstanding the construction given by the Court to section 11; since even if the defendant's liability to account were not to be considered "a question relating to the execution of the decree," within the meaning of the section, he was, in any case, precluded by the ordinary principles of estoppel from contending that the mesne profits in question were not payable under the decree.

Where a Court has a general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiæ*.

---

* *Vide* 15, B. L. R., p. 383.

Sir J. W. Colvile.—Shunmooga Pillai and Chiddunbrun Pilla were cousins, and the only members of a joint and undivided Hindu family. Shunmooga died first, and in 1858 the appellant, claiming to be his adopted son, brought a suit to enforce his rights against Chiddunbrun, who denied the validity of the alleged adoption. The suit was in its nature one to establish the plaintiff's title as the heir of his adoptive father, and to obtain a partition of the joint family estate. It specifically claimed the mesne profits of the landed property from the date of the alleged exclusion,—that is to say, from the Fusli year 1267, corresponding with 1857-58, but did not claim mense profits for the subsequent years. On the 11th of June 1859, the Civil Judge of Cuddalore made a decree in the plaintiff's favor, which affirmed his title as adopted son of Shunmooga, awarded to him a moiety of the joint estate, including certain lands, and the sum of rupees 4,395-6-7½ as his share of the mense profits of such lands for the Fusli year 1267, but was silent as to the mesne profits which had accrued since the institution of the suit. Both parties appealed against this decree to the Sudder Court of Madras, which, by its decree dated the 24th of September 1860, dismissed the defendant's appeal and modified the decree of the Civil Court by awarding to the plaintiff a further sum of Rs. 3,494-4-1 as the value of his share in certain jewels and other moveable property. It left the decree of the Civil Court untouched in respect of the mesne profits of the immoveable property. The defendant appealed against the decree of the Sudder Court to Her Majesty in Council. His appeal abated on his death in 1862, but was revived by his son, the present defendant, and was finally dismissed by an order in Council in February 1864. This antecedent litigation, therefore, has conclusively established the title of the plaintiff to whatever he can claim under the decree of the 11th of June 1859 as varied by that of the 24th September 1860.

In September 1864, the plaintiff commenced the proceedings, out of which this appeal has arisen, in order to obtain execution of the decree made in his favor. By his petition he prayed to be put into possession of his share of the lands; to have execution for the ascertained sums awarded to him by the decree, including the mesne profits for the Fusli year 1267, with the interest thereon; and also to have execution for the two further sums of Rs. 48,075-14-1, and Rs. 15,890-15-7, the first being the alleged amount of mesne profits for the six years from Fusli 1268 to Fusli 1273; and the latter the estimated amount of interest due on such mesne profits. He has been put into possession of

his share of the lands, and may be assumed, subject to what may be said hereafter touching his share of the outstanding debts due to the joint estate, to have obtained all to which he can be entitled under the decree except the two last mentioned items, or such other sums, if any, as may be due to him for the mesne profits for the years in question, and interest thereon. His claim to such subsequent profits and interest was litigated between him and the respondent in the proceedings which will be hereafter more particularly considered. The result of these was an order of the Civil Court, dated the 31st of January 1872, which awarded to the plaintiff the sum of Rs. 36,223-6-2 for mesne profits, but rejected his claim for interest thereon. Against that order both parties appealed, the plaintiff insisting that he was entitled to more than had been awarded to him for mesne profits, and also to interest on such profits; the respondent for the first time contending that inasmuch as the mesne profits in question were neither asked for in the plaint, nor awarded to the plaintiff in the decree, the Civil Judge had no jurisdiction to award them under s. 11 of Act XXIII. of 1861, the enactment under which he had proceeded, and taking other objections to the order.

On the 28th of June 1872, the High Court of Madras disposed of these appeals by reversing the order of the Civil Court on the ground that, under the decree in the original suit, mesne profits subsequent to 1858 were not recoverable. The present appeal is against the last-mentioned order.

The first question to be considered is the construction to be put upon the 11th section of Act XXIII. of 1861, of which the material portion is in the following words:—"All questions regarding the amount of any mesne profits which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit, between the date of the suit and the execution of the decree, ... and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal."

It is contended, on behalf of the appellant, that the words "all questions regarding the amount of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the suit and the execution of the decree," are wide enough to

embrace, and ought to be taken to embrace, the claims now under consideration. On the other hand, the learned counsel for the respondent insist that the word "payable" is to be read as "payable under the decree," and have cited numerous cases to show that, notwithstanding some earlier decisions to the contrary, all the High Courts of India have now accepted as settled law these propositions: 1st, that where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot, under the clause in question, assess or give execution for such interest or mesne profits; and 2nd, that the plaintiff is still at liberty to assert his right to such mesne profits in a separate suit. That this construction has now for several years prevailed in the High Court of Calcutta is shown by the Full Bench ruling of the 13th of September 1866—*Mosoodun Lall* v. *Bheekaree Singh* (1); the decision of the 18th of June 1868—*Haramohini Chowdhrian* v. *Dhanmani Chowdhrian* (2); and numerous other cases. That it has been adopted by the other High Courts is shown: as to that of the North-West Provinces, by the decision of the 10th of November 1869—*Chowdhree Nain Singh* v. *Jawahur Singh* (3); as to that of Madras, by the ruling of the 12th of February 1869—*Subba Venkataramaiyan* v. *Subraya Aiyan* (4); and as to that of Bombay, by the Full Bench ruling of the 10th of December 1867, in *Radhabai* v. *Radhabai* (5), followed by the decision of the 15th of June 1869 in *Sitaram Amrut* v. *Bhagvant Jaganath* (6).

The alleged *consensus* of the Indian Courts being thus established, their Lordships, whatever their opinion upon the construction of this clause might have been, had the question been *res integra*, do not think it would be right to run counter to so long a course of decision upon what is, in fact, merely a question of procedure,—it being admitted that the plaintiff may assert rights of this nature, if they exist, in a separate suit. They, therefore, accept the construction of the Indian Courts as settled law; and that acceptance, as was admitted at the bar, suffices to dispose of the claim to interest on the subsequent mesne profits which is raised by the present appeal.

It was, however, contended, as to the principal of the mesne profits in question, that the special circumstances of this case take the plain-

(1) B. L. R., Sup. Vol., 602.
(2) 1, B. L. R., A. C., 138.
(3) 1, All. H. C. R., 167.
(4) 4, Mad. H. C. R., 257.
(5) 4, Bom. H. C. R., A. C., 181.
(6) 6, Bom. H. C. R., A. C., 109.

tiff's claim out of the general rule; and are sufficient to support the order of the Civil Court of the 31st of January 1872. And their Lordships will now proceed to consider what those circumstances are and the legal effect of them.

The decree of the 11th of June 1859 conclusively established the right of the plaintiff as against the defendant to a share in the lands forming part of the joint estate, and to the mesne profits attributable to that share for the Fusli year 1267, being the year next preceding the institution of the suit. His title, therefore, to the lands, of which he has obtained possession, and to mesne profits on those lands from a certain date, cannot be impugned. Had there been no appeal, and the decree had been followed by immediate execution, the plaintiff would have been put into possession of his lands, and would ever since have received the rents and profits of them. The only mesne profits touching which any question could have arisen, would have been those for the year which elapsed between the date of the institution of the suit and that of the decree. Execution was suspended, but not necessarily suspended, by the appeals, and the defendant could only remain in possession on the terms of giving security for the execution of the decree, should it be affirmed against him.

Such being the legal position of the parties, the plaintiff, on the 8th of December 1859, presented a petition to the Civil Judge of Cuddalore, claiming, in addition to the mesne profits specifically given by the decree, a certain sum as the then ascertained mesne profits for the Fusli year 1268 (being that which immediately followed the institution of the suit), and a further sum for the mesne profits not yet ascertained for the Fusli year 1269; and praying that, should the defendant fail to give security for the subsequent profits, security to abide the event of the appeals should be taken from the plaintiff, and that he should be allowed to take out immediate execution. A counter-petition was filed, and other proceedings had; but ultimately an order of the Court was made, under which the defendant executed the instrument of the 26th of January 1860.

The Sudder Court made its decree disposing of the appeals in September 1860; and on the 11th of December in that year the plaintiff, contemplating the possibility of the appeal to Her Majesty in Council, which was afterwards preferred, made a second application to the Civil Court of Cuddalore, praying that the defendant might give further security to cover both the additional sum awarded to the plaintiff by the

decree of the Sudder Court, and the mesne profits of the lands for the current Fusli year 1270; and that in default of his doing so, security to abide the event of the appeal might be taken from the plaintiff, and he be allowed to execute the decree. Upon this second application an order of the Court was made, under which the defendant executed the further security of the 19th of March 1861.

The original defendant died, and the appeal was revived by the respondent as his son and heir some time in 1862.

On the 29th of January 1863, the plaintiff applied again to the Civil Court of Cuddalore, praying that the respondent, as the heir of the original defendant, should give security for the mesne profits for the Fusli years 1271 and 1272, with the usual alternative that, if he should fail to do so, security to abide the event of the appeal should be taken from the plaintiff, and he be allowed to have execution. On this application an order of the Court was made, under which the respondent executed the document dated the 25th April 1863.

That instrument is addressed to the Civil Court of Cuddalore, is entitled "a ready-money security bond respectfully executed by the respondent as son and heir of the original defendant," and is in these words:—

"Pursuant to the order passed by the Court requiring me to furnish security for the two Fuslis 1271 and 1272, the probable amount whereof has been put down at Rs. 9,880-12-11 for both the Fuslis, in original suit (O. S.) No. 1 of 1858 of the said Civil Court, I agree to pay up the same when the original decree comes to be executed. Failing to do so, I consent to my property hereunder mentioned being proceeded against, and the amount recovered. Deducting, therefore, from the said amount of Rs. 9,880-12-11, Rs. 4,616-15-11, which is the surplus in the security furnished in 1270, the remainder is Rs. 5,264-13-0; for this amount I give you a security lien upon the property hereunder mentioned, and indisputably belonging to my share." Then follows a list of property.

The two former instruments executed by the original defendant are substantially to the same effect. They are also addressed to the Civil Court; they contain an obligation to pay subsequent mesne profits for the years which they respectively cover, and point even more plainly to the ascertainment of the amount of such profits when the decree should come to be executed, and to their realisation, if not then paid, by the Court. The effect then of each document seems to be an under-

taking on the part of the person executing it, and that not by a mere written agreement between the parties, but by an act of the Court, that in consideration of his being allowed to remain in possession pending the appeal, he will, if the appeal goes against him, account in that suit, and before that Court, for the mesne profits of the year in question. That such was the understanding of the parties is shown by the earlier proceedings in execution, and in particular by the respondent's counter-petitions of the 13th of October 1864 and the 25th of April 1868. By the first of these the respondent, not disputing his liability for the six years' mesne profits claimed, though he did dispute his liability for interest thereon, offered terms of compromise, and only suggested that the account, by reason of its complexity, would be better taken in a regular suit. The second contains this statement :—" The plaintiff now claims mesne profits for the years subsequent to the decree. Though this petitioner is bound to pay the same, still the amount asked by the plaintiff is excessive, and has been fixed by him at his pleasure ;" and then follows a plea *ad misericordiam*. The objection now taken to the recovery of these subsequent mesne profits by proceedings in execution was first taken by the respondent in the grounds of appeal filed by him in May 1872. That the respondent should have come under the obligation supposed ; that the plaintiff should have failed to apply either to the Civil Court or to the Appellate Court for the amendment of the original decree by making it a decree for mense profits subsequent to the institution of the suit; and that the respondent should have omitted, whilst the proceedings in execution in the Civil Court, to take the objection now taken to them, are all circumstances which the fact that up to December 1867 the wider construction for which the appellant contends was put upon the 11th section of the Act of 1861 by the Courts of the Presidency of Madras, and regulated their practice, goes far to explain. But if the respondent has contracted an obligation to account in this suit for the subsequent profits claimed, he cannot escape from it, because when he contracted it the course and practice of the Courts proceeded upon a construction of a Statute which has since been pronounced to be erroneous.

Their Lordships will now consider some of the objections which have been taken to the conclusion that the respondent has, by the proceedings in question, incurred the obligation supposed.

It was said that the last (so-called) " security bond" was alone the act of the respondent, and a distinction was taken between his obliga-

tion under that and those incurred by his father under the two other instruments. Their Lordships, however, observe that these are not mere bonds of the father, in respect of which the respondent as heir might be liable in the ordinary way. They are proceedings in Court importing a certain liability to be enforced in the suit against the defendant to that suit. By reviving the appeal, the respondent substituted himself for his father as defendant in the suit; and assumed the position of defendant with all the rights and liabilities which had previously attached to it. And that he intended to do so is further shown by the claim in his security bond to take credit for a sum which he alleged to be surplus security given by the preceding bond.

Again, it was suggested that the proceedings in the lower Court, which resulted in these security bonds, were irregular; that after the appeal to the High Cour t the power to allow or to suspend execution, and, in the latter case, to fix the terms on which execution should be suspended, belonged solely to the Appellate Court. Their Lordships are by no means clear that this objection is well founded; but whether it be so or not, it comes too late. It was never taken in the lower Court where the proceedings were had. There was no appeal from the orders of that Court, which directed security to be given. It would be in the highest degree unjust to allow such an objection now to prevail against the appellant.

Again Mr. Norton argued that the proceedings of the Civil Court of Cuddalore in the appointment of the commission and the assessment of mesne profits were irregular, because its powers were spent, at all events as to the mesne profits, by the execution issued by Mr. Ellis, the then Judge, in January 1865. Their Lordships can see no ground for this objection. It would seem that the intention of the Court, whether under Mr. Ellis, or his successor, Mr. Hodgson, was to give the plaintiff execution as prayed by his petition, but to give it piecemeal, and as it could conveniently be given. The order in question gave him execution for the ascertained sums to which he was entitled under the decree. In December 1865, he was under a later order put into possession of the land. The amount of the subsequent mesne profits could only be ascertained by inquiry. The same proceedings would probably have been had if the decree had expressly given the mesne profits subsequent to the institution of the suit under s. 196 of the Code of Procedure.

Upon the whole, their Lordships are of opinion that the respondent, by the proceedings in question, did come under an obligation to account

in this suit for the subsequent mesne profits of the appellant's land, which was capable of being enforced by proceedings in execution, notwithstanding the construction of the 11th section of the Act XXIII. of 1861, which now prevails in Madras. They conceive that this liability made the accounting "a question relating to the execution of the decree" within the meaning of the latter clause of the section. But even if it did not, they think that upon the ordinary principles of estoppel the respondent cannot now be heard to say that the mesne profits in question are not payable under the decree. Nor do they feel pressed by the observations made by Markby, J., in the case of *Ekowri Singh* v. *Bijaynath Chattapadhya* (1).

The Court here had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani* v. *The Attorney-General of Gibraltar* (2), in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*.

From what has been said it follows that, in their Lordships' opinion, the order of the High Court, which is under appeal, ought to be reversed. Their Lordships would have felt great regret in coming to the contrary conclusion. That proceedings begun in 1864, and for several years carried on without objection, should in 1875 be pronounced infructuous on the ground of irregularity, and the party relegated to a fresh suit in order to assert an indisputable right, would be a result discreditable to the administration of justice. In such a suit the plaintiff would probably find himself, either successfully or unsuccessfully, opposed by a plea of limitation. If such a plea were successful, great injustice would be done to the plaintiff; if it were unsuccessful, the respondent would probably find himself in a worse position than that in which he will be placed by the allowance of this appeal; since in such a suit the plaintiff might recover interest.

With the claim for interest made by the present appeal their Lordships have already dealt. They can see no grounds for the other objections taken by the appellant to the order of the Civil Court. They are of opinion, in particular, that, in the circumstances of the case, that Court could not have dealt otherwise than it has dealt with the plaintiff's share in the outstanding debts. On the other hand, the respondent has not insisted on any of the objections taken in his grounds of appeal to the High Court other than that on which the High Court made its order. Their Lordships, therefore, will humbly advise Her Majesty to reverse the order of the High Court of the 28th of June 1872, and in lieu thereof to order that the appeal against the order of the Civil Court of Cuddalore of the 31st of January 1872 do stand dismissed and the said order affirmed, and that each party do pay his own costs, both of the appeal to the High Court and of this appeal.

(1) 4, B. L. R., A. C., 111. (2) L. R., 5, P. C., 516.

LAW AND FACT.

There is no distinction more important in legal proceedings than that which discriminates between Law and Fact. Two matters of investigation are presented to every Court, the one relating to what the Law has commanded or forbidden, the other dealing with the question whether some person indicated has done, or omitted, an act which falls under the classification of that which has been so forbidden, or enjoined. That it is wise to depute the duty of ascertaining the nature of the Law, from the responsibility of determining, whether or not a certain person has performed an act or omission attributed to him, has been for ages recognised by the legal methods of Great Britain. Nor is there anything insular in so acting. A distinction between the tribunals appointed to try questions of Law and Fact existed among the Romans, and obtained its clearest expression under their Formulary system. The modern course is to have Judges and Juries, the former being under an obligation to declare the Law, and the latter to arrive at the matter of Fact. Occasionally it has happened that juries have been so manifestly unwise in the performance of their duty, that a persuasion of their incompetence has become general. But it is worthy of remark that an erroneous judgment on their part has rarely ever been prejudicial to the liberty of the subject. Injustice may now and then be done by the adoption of too lenient a view, in regard to the guilt of a person accused, but it is almost an unheard-of thing for a jury to send an innocent man, or a man whose guilt rests on no truly satisfactory testimony, to punishment. This is the glory of the jury-system. That system has been called the palladium of British Liberty, and with justice in respect to some critical periods of British Constitutional History. But practically that system at the present day is as valuable as ever, though not precisely from the same cause. In the nineteenth century we look to our juries to save us from judicial blindness and caprice. Twelve men of business, who are more or less intimately acquainted with the world around them, are infinitely more competent to decide upon the truth or falsity of evidence given upon oath, than any judges can possibly be, whose minds may be powerful and acute, but who lack that experience of out-of-door life, which is necessary to enable any one to see clearly, how far certain classes of men are to be relied upon.

That we have not been making any rash assertion in regard to the value of the British plan of leaving a jury to arrive at Fact, while

judges are called upon simply to determine Law, the testimony of many of the ablest men that have sat on the bench at Westminster might be quoted. It will, however, be sufficient for our present purpose, if we make a short extract from Serjeant Stephen's great work on the laws of England. He says "in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice."

CALCUTTA HIGH COURT.

The 21st March and 10th April, 1876.

PRESENT:

The Hon'ble Sir R. Garth, *Kt., Chief Justice,* and the Hon'ble Mr. Justice Pontifex.

THE QUEEN, *vs.* HURRYBOLE CHUNDER GHOSE.

Confession made to a Police Officer who is also a Magistrate—Inadmissibility in Evidence—Sec. 25* *and* 26† *of Act I. of* 1872—*Review—Criminal Case—s.* 167‡ *of Act I. of* 1872—*Section* 26 *of the Letters Patent.*

The terms of s. 25 of Act I. of 1872 are imperative and a confession made to a Police officer, *under any circumstances,* is not admissible in evidence. The 26th Section is not intended to qualify the 25th. The humane object of s. 25 is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect and there is no sufficient reason for reading the 26th section so as to qualify the plain meaning of the 25th.

---

* Section 25 of Act I. of 1872. No confession made to a Police Officer, shall be proved as against a person accused of any offence.

† Section 26 of Act I. of 1872.—No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

‡ Section 167 of Act I of 1872.—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

The Commissioner and Deputy Commissioner of Police are to be considered Police Officers in construing s. 25 of the Evidence Act.

Section 167 of the Evidence Act applies to civil as well as to criminal cases. The Court mentioned in that section which is to decide upon the sufficiency of the evidence to support the conviction is the *Court of Review*, and *not the Court below*.

Apart from s. 167 of the Evidence Act, s. 26 of the Letters Patent authorizes the High Court either to quash or confirm the conviction as they may think proper.

GARTH, C. J.—In this case, the prisoner Hurrybole Chunder Ghose was tried and convicted, at the February Sessions of the High Court, for using certain forged documents, and sentenced to ten years' transportation.

At the trial before Mr. Justice Macpherson, it was proposed on the part of the prosecution to put in a confession made by the prisoner. The confession was made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police, Mr. Lambert, at the Police Office in Calcutta, where he again affirmed the truth of his former statement to Mr. Lambert, and Mr. Lambert, in his capacity of a Magistrate, received and attested the statement.

Upon this confession being tendered in evidence, it was objected to by the prisoner's Counsel, upon the ground that it was a confession made by the prisoner to a Police officer, and therefore not admissible, by reason of the 25th Section of the Evidence Act (I. of 1872).

In answer to this objection, it was urged on the part of the prosecution—1st, that Mr. Lambert was not a "Police Officer" within the meaning of the section; 2nd, that, if he were, the statement was made to him as a Magistrate, and not as a Police officer; and that the 2nd Section was intended to qualify the 25th, so as to make a statement even to a Police officer admissible, if made in the presence of a Magistrate.

The learned Judge at the trial admitted the evidence, and declined to reserve the point; but the Advocate-General having since given a certificate, under Section 25 of the Letters Patent of the High Court, that the point was a proper one to be considered, it has been brought before this Court for review, and has been well and fully argued before us.

It was urged by Mr. Jackson, for the prisoner, that the terms of Section 25 are imperative, that a confession made to a Police officer, *under any circumstances*, is not admissible in evidence against him, and that the 26th Section is not intended to qualify the 25th, but means

that no confession made by a prisoner in custody, to any person other than a Police officer, shall be admissible, unless made in the presence of a Magistrate.

I am of opinion that this is the true meaning of the 25th Section. Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect, and I see no sufficient reason for reading the 26th Section so as to qualify the plain meaning of the 25th.

But then comes the question whether Mr. Lambert was a Police Officer within the meaning of Section 25.

It was argued, and with some force, that the term Police Officer did not mean a Deputy Commissioner of Police; that it comprised only that class of persons who are called in the Bengal Police Act (Act IV. of 1868) "members of the Police Force"; and that the object of the Evidence Act was not to prevent a gentleman in Mr. Lambert's position from taking a confession, but only ordinary members of the Police force, who are personally and constantly engaged in the detection of crime and the apprehension of offenders.

There is no doubt that, looking at the various sections of Act IV. of 1868 B. C., the Deputy Commissioner of Police is not a member of the Police force within the meaning of that Act, and, moreover, on looking back to the Police Act of 1861, it will be found that the term "Police officer," as used in that Act, has generally the same meaning as a member of the Police force in the Act of 1868; but, in construing the 25th Section of the Evidence Act of 1872, I consider that the term Police officer should be read not in any strict technical sense, but according to its more comprehensive and popular meaning.

In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of Police, or in other words Police officers, quite as much as the more ordinary members of the force; and, although in the case of a gentleman in Mr. Lambert's position, there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person; and I think it better in construing a Section such as the 25th, which was intended as a wholesome

protection to the accused, to construe it in its widest and most popular signfication.

I am of opinion, therefore, that the confession made by the prisoner in this case ought not to have been admitted at the trial.

But then comes the further very important question, what should be the effect of this improper admission of evidence on the proceedings?

The 167th Section of the Evidence Act provides that "the improper admission of evidence shall not be ground of itself for the reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision;" and I was certainly disposed to think, before hearing Mr. Jackson's argument, not only that this section applied to criminal as well as civil cases, but that the Court which had to determine whether, independently of the evidence objected to, there were sufficient materials to justify a conviction, was the Court below, before which the case was originally tried; and, upon this assumption, my learned colleague and I consulted Mr. Justice Macpherson, who certified that there was ample evidence in the Court below, independently of the admission, to justify the conviction in this case.

Mr. Jackson, however, desired to be heard upon the effect of Section 167, and he had urged upon us,—first, that the section does not apply at all to criminal cases, and, secondly, that, if it does, the Court to determine whether the conviction ought to stand, is not the Court which tried the case, but the Court before whom the point of the admissibility of the evidence was argued.

Mr. Jackson insisted that the word "decision" used in Section 167 was one inapplicable to a criminal case tried on the original side of this Court, and that it never could have been intended by the legislature that a case triable by a jury, and of the facts of which a jury alone are the proper judges, should be virtually re-tried by any Court not consisting of a jury; and in aid of his argument, he cited the case of Regina *vs.* Navrojee Dada Bhai (IX., Bombay L. R., p. 358.)

I am unable, however, to discover any sufficient reason why the 167th Section of the Evidence Act should not apply to criminal, as well as civil, cases. It is perfectly true that the word decision is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases; and, if it was the intention of the legislature to use an expression which would apply equally to civil as to

criminal proceedings, there is properly no other word which would have answered their purpose better. Many other provisions of the Evidence Act apply equally to all judicial enquiries, and, if the nature of the mischief which the section was intended to remedy is considered, there is at least as much reason why it should apply to criminal as to civil proceedings. The Court have no power in a criminal case to order a new trial, and, if, in each instance where evidence is improperly admitted or rejected, the conviction is to be quashed, a lamentable failure of justice would often be the consequence.

I am of opinion that Section 167 does apply to criminal cases, but, upon consideration, I think that the court mentioned in that section which is to decide upon the sufficiency of the evidence to support the conviction is the *Court of review*, and *not the Court below*.

The point is certainly "raised," properly speaking, in the Court below, but it is both raised and argued in the Court of Appeal, and we think that the proper course of proceeding is for the Court of Appeal to decide upon the case, upon being informed from the Judge's notes, and, if necessary by the Judge himself, of the evidence adduced at the trial.

Apart, however, from Section 167 of the Evidence Act, I think that, under Section 26 of the Letters Patent, by virtue of which this case has been submitted to us for review, we have a right either to quash or to confirm the conviction, as we may think proper. The section enables the Court, after deciding upon the point reserved or certified, to pass such judgment or sentence as it may think right. If, therefore, upon reviewing the whole case, we are of opinion that, upon the evidence properly received, there is sufficient ground to convict the prisoner, I consider that we ought to allow the conviction to stand.

In the present case, therefore, we have obtained copies of the Judge's notes at the trial, and have also obtained further information from the Judge as to what particular portion of the evidence applied to the prisoner Hurrybole Chunder Ghose, and we are now prepared to hear the case argued upon its merits, as to whether there is sufficient evidence, apart from that improperly admitted, to support the conviction.

PONTIFEX, J.—I also am of opinion that the confession made by the prisoner in Mr. Lambert's presence ought not to have admitted at the trial. Without going so far as to say that Section 25 of the Evidence Act renders inadmissible a confession made to any person connected with the Police, for there are cases in which a person holding high

judicial office has control over and is the nominal head of the Police in his district, I think that, in the present case, it was impossible for Mr. Lambert, residing in the house allotted to him as Deputy Commissioner of Police, and surrounded by Police immediately under his control, to divest himself of his character of a Police officer. I also agree that, under Clause 26 of the Charter, which clause deals with cases tried before a jury, we are bound to consider the admissible evidence in this case, and to pass such judgment and sentence as we shall think right, and I come to this conclusion without reference to Section 166 of the Evidence Act.

I agree that such last-mentioned section is applicable to criminal trials, but I have some doubt whether, if we were proceeding under it alone, we should be the proper Court to consider the sufficiency or insufficiency of the evidence in relation to the verdict.

GAMBLING.

The tendency to gamble seems irrepressible. First in one form, then in another, the passion springs up again after every attempt at its extinction. There would seem to be a charm about gambling for the inhabitants of every clime. It matters not where one goes, there are dice or cards, or the drawing of lots, or some other mode of appealing to the determination of Chance. People all over the world believe in a divinity whom they call Luck, and are scarcely happy if it be proposed to them to regulate all their acquisitions by the mere instrumentality of patient forethought. The Romans had a deep-seated reverence for the goddess Fortuna, and were not disposed to believe the modern doctrine that Providence is always on the side of the heaviest battalions. A story is told that one of their great generals once so far forgot what was due to the fickle goddess as to describe a certain victory he had won, with the addition that in that victory at least there was nothing due to Fortune. The fable is, he never succeeded again. The story shows the tenacity of the conviction held by the Romans that Fortune, Chance, or some power other than mere settled Law, had an influence on human affairs ; and that kindred ideas still obtain everywhere is manifest from the prevalence of what is called gambling. Yet that the habit of gambling is prejudicial to the best interests of a Commonwealth is generally admitted. We see that little chinks widen, and that the man who trusts to Chance one day, in a slight matter, will place his reliance upon it another day in a more serious one. Characters under the in-

fluence of gambling may be continually seen, "going to the bad" as the phrase runs. Betting is a modern and English phase of this common proclivity, but fortunately the good sense of the community keeps the disposition in our part of the world within safe limits. Certainly here in India we suffer little from what has been, in the case of many men in England, a positive mania. Every one there knows of somebody or other, who has made away with a fine property by incessant betting. Now that the "pari mutuel" system has been introduced on to our Indian race-courses, the very moderate amount of speculation that has hitherto characterised the "turf" in this country may be expected to become still more sober and restrained. But while that is a circumstance to congratulate ourselves upon, it must be admitted that in another direction the gambling tendency is positively running wild. A few years ago Indian ltoteries were small affairs. Now they are great ones, and people join them in the hope of winning hundreds of pounds. There is not much harm of a palpable kind about these race-lotteries. No one is ruined by the loss of few rupees. The mischief really and truly lies in the universal encouragement that is given to a mental mood that is not a good one, and which may bring larger evils in its train. Lotteries most certainly are not beneficial to the character of any one, and while the winners place money to their credit at the Bank they are morally worse off than they were before.

Section 294A of Act XXVII. of 1870 (the Penal Code) runs thus, "Whoever keeps any office or place for, the purpose of drawing any Lottery not authorised by Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

"And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, or any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees."

Race lotteries seem to have a sort of prescriptive legality, if they do not possess any better title. But should their already too large figures be increased, legislature ought then to take measures against their prolonged existence, the more especially as they are, simply in a matter of fact light, quite indefensible for any figure large or small.

CALCUTTA HIGH COURT.

The 2nd December, 1875.

PRESENT:

Mr. Justice Macpherson and Mr. Justice Morris, *Judges.*

DYEBUKEE NUNDUN SEN* and another (*Defendants*) *Appellants*,

versus

MUDHOO MUTTY GOOPTA and another (*Plaintiffs*) *Respondents.*

Act XI .of 1865, *ss.* 6 *and* 12—*Civil Court, Jurisdiction of—Mofussil Small Cause Court—Act XXIII. of* 1861, *s.* 27—*Special Appeal.*

A suit for a balance due on account of rents collected from the plaintiff's zemindaris by the defendants' father acting as agent of the plaintiffs, is a suit in which money is claimed as due on a contract within the meaning of s. 6, Act XI. of 1865. Where the amount claimed in such a suit does not exceed Rs. 500, it is cognizable by a Small Cause Court, notwithstanding it may be necessary to go into the accounts of both parties to determine what is due. Where such a suit for an amount under Rs. 500 is entertained by the Civil Court within the local jurisdiction of a Small Cause Court, a special appeal lies to the High Court, s. 27 of Act XXIII. of 1861 only applying to a suit which is properly brought in a Civil Court, because there is no Small Cause Court having jurisdiction to try it.

MACPHERSON, J.—We think that in this case the Munsif was right in holding that the proceedings throughout have been without jurisdiction, because the suit is of a class cognizable by the Small Cause Court of Rampore Beauleah, and is therefore one which, under s. 12, Act XI. of 1865, could not be heard or "determined in any other Court having jurisdiction within the local limits of the jurisdiction" of that Small Cause Court.

The suit is for a balance claimed to be due on account of rents of the plaintiffs' zemindaris collected by the father of the defendants. It is a suit in which money is claimed as due on a contract within the meaning of s. 6 of Act XI. of 1865; and therefore is a suit cognizable by the Small Cause Court, as the amount claimed did not exceed Rs. 500; and it is none the less cognizable by the Small Cause Court, because it may have been necessary to go into the accounts of both parties to see whether the amount claimed is really due or not. S. 6 contemplates the possibility of having to examine accounts between parties, for it says:—"The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract . . . . . or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of Rs. 500, whether on balance of account or otherwise." The only balance of account excepted being "a

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 123.

balance of partnership account, unless the balance shall have been struck by the parties or their agents."

In thus deciding, we are in accord with the decision of a Division Court in the case of *Joogul Kishore Roy v. Rughoo Nath Seal* (1). An order made by another Division Court, in the case *of Krishna Kinkur Roy* v. *Madhub Chunder Chuckerbutty*, may perhaps appear to decide the same question differently. But the Judges in the latter case merely concurred in the opinion of the Judge of the Small Cause Court, who made the reference to this Court. The opinion was that the suit (which involved intricate accounts) should be tried by the ordinary Civil Court, and not by the Court of Small Causes. The technical question of jurisdiction was not raised either by the Judge of the Small Cause Court or by this Court; and the whole matter seems to have been treated more as one of convenience than of strict law. Moreover, no one appeared to argue the case in the High Court.

It is said that, as the present case has been tried by the Civil Court, we have no right to meddle with its decision, because s. 27, Act XXIII. of 1861, says:—"No special appeal which shall lie from any decision or order shall be passed on regular appeal by any Court subordinate to the High Court, in any suit of the nature cognizable in Courts of Small Causes, when the debt, damage, or demand for which the original suit shall be instituted shall not exceed Rs. 500, but every such order or decision shall be final." But s. 27 of Act XXIII. of 1861 applies only to a suit which is properly brought in a Civil Court, because there is no Small Cause Court having jurisdiction to entertain it. Where a Small Cause Court has been constituted, that Court alone has jurisdiction in a certain class of cases. But where no Small Cause Court has been constituted, that same class of cases must be brought in the ordinary Courts. If they are properly brought in the ordinary Courts by reason of there being no Small Cause Court having jurisdiction, then (and then only) s. 27 of Act XXIII. of 1861 is applicable. That section is not to be construed as meaning that, if a suit is improperly brought in a Civil Court which has no jurisdiction to entertain it, instead of in a

(1) Special Appeal No. 757 of 1872, heard before Jackson and Mitter, JJ., on the 24th April 1873.—This was a suit to recover Rs. 428, balance of account due from the defendant, who had been employed by the plaintiff as an agent to look after his law suits, and receive and disburse money connected with such suits, the defendant receiving a monthly salary. It was held that it was a suit within the meaning of s. 6, Act XI. of 1865, and therefore no Special Appeal would lie. See also *Prosunno Chunder Roy* v. *Sreenath Sreemanee*, 7, W. R., 422 (Jackson and Markby, JJ.)

Small Cause Court which has jurisdiction, the parties cannot come up in a special appeal to have the matter set right (1). We have no doubt that a special appeal does lie in such cases.

We set aside the decree of the Subordinate Judge. The appeal is allowed, and the plaintiffs' suit dismissed, on the ground that it ought to have been brought in the Small Cause Court of Rampore Beauleah, and that the Munsif had no jurisdiction. The plaintiff must pay the costs of this appeal and of the proceedings out of which this appeal arises, that is to say, of the last hearing before the Subordinate Judge.

CALCUTTA HIGH COURT.

The 6th and 13th September, 1875.

PRESENT:

Mr. Justice Phear.

MOKOONDO LALL SHAW* and another (*Plaintiffs,*)

versus

GONESH CHUNDER SHAW and another (*Defendants.*)

Hindu Law—Will—Clause restraining Partition or Enjoyment.

Where a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment thereof by a clause that they should not make any division for twenty years, *Held* that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once.

PHEAR, J.—The testator directs his eldest son to pay out of the profits of his business Rs. 200 a month for the family expenses of his sons, if they remain living in commensality, or Rs. 70 a month to himself, Gunesh Chunder, and Rs. 43 and odd annas to each of the three other sons if they separate. This is to go on for twenty years, Gonesh Chunder managing the property; meanwhile, if he dies, the next son in succession is to be manager and so on, and the rest of the profits over and above the Rs. 200 per month are directed to be invested and accumulated. Then the testator declares [read portions of the 1st and 5th paras. The first paragraph of the will contains " After twenty years from my death my sons will be at liberty to divide and take the aforesaid business, but before the aforesaid twenty years (have elapsed) my sons will not be competent to divide the capital stock and profits of the aforesaid business, and the business will not be made liable for their respective debts.

(1) See Tarini Charan Mookerjee *v.* Rajah Poorno Chunder Roy, 6, B. L. R., 717, where, however, the order setting aside the decree was made under the 15th section of the High Courts' Act.

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 104.

The 5th para. was as follows :—" Whatever other immoveable property, &c., I have besides the said business, I give to my sons in equal shares; as soon as they wish they may divide and take it in equal shares. But after the lapse of twenty years from my death, my eldest son Gonesh Chunder and his heirs becoming rightful proprietors, will get a 5-anna share of the whole of my aforesaid business and the profits thereof and the property which has been purchased with the said profits : of the remaining 11-anna share Mokoondo Lall and his heirs will get a 4-anna share, Promodee Lall and his heirs a 3-anna share, and Nrigendro Lall and his heirs a 3-anna share.")

I entertained some doubts at first whether the passages which I have read amounted to any disposition of the property other than the Rs. 200 a month during the period of twenty years. The words " neither he nor any of my other sons shall acquire any rights therein" seemed to exclude the supposition that they were intended to have any interest in the business during that time, and some of the words of paragraph 5 to some extent confirmed that view. On the other hand, the substance of paragraph 5 seems to contemplate that the property is given at once in specified shares to the sons; and there would be a very considerable inconvenience on the body of the will on any other interpretation. I have come therefore to think that the words " neither he nor any of my other sons shall acquire any rights therein" mean rights of immediate enjoyment. The accumulations which are directed to be made and invested are ultimately given to the sons in the same shares as the original property ; and on the whole, I think, the true construction of the disposition is that the testator gives all his property in these businesses to his sons in the shares which are specified in para. 5 ; but postpones their enjoyment of this property for twenty years subject only to the monthly gift of Rs. 200 to the sons jointly for household expenses, or in the shares I have already mentioned in the event of their living separate. Now, without saying that a Hindu testator might not give the current profits or income of the property to the trustees and direct them to apply this to the payment of debts throughout a specified period, as twenty years, I do not think it is competent to him to give the corpus of the property to an adult person and at the same time to forbid that person from enjoying the property in the way which the law allows. The prohibition against receiving and enjoying the income for twenty years appears to me simply to be a condition imposed on the property which is repugnant to the gift. It is not merely the giving

of one portion of the property to one person or purpose, and the remaining portion to another person or purpose; but it is giving the entire property to one person and coupling this gift with a prohibition against his enjoyment. The attempt to do this is I think void in law. The result is that, on this will as I construe it, the parties to the suit are immediately entitled to the businesses subject only to the direction with regard to the application of Rs. 200 per month for household expenses. I think therefore they are entitled to the partition.

HIGH COURT, N. W. P.

The 26th August, 1875.

PRESENT:

(Mr. Justice Turner, *Officiating Chief Justice*, and Mr. Justice Oldfield.

UDA BEGUM, *(Plaintiff)*

versus

IMAD-UD-DIN* and others, (*Defendants.*)

Equitable Estoppel—Laches—Acquiescence—Limitation.

The plea of acquiescence is applicable to suits for which a fixed term of limitation is prescribed by law, but mere delay in enforcing a right does not constitute acquiescence. (*Rama Rau* v. *Raja Rau* (1), impugned: *Peddamuthulaty* v. *N. Timma Reddy* (2), approved with certain qualifications.)

The defendants took possession of, and erected buildings on, land which they knew belonged to the plaintiff and they had no claim to, without applying to the plaintiff for consent. The plaintiff abstained from suing to eject them for one or two years, knowing that the defendants were building on the land.

Held, under the circumstances, that the delay in the institution of the suit was not sufficient to deprive the plaintiff of her right to relief.

In this case, the plaintiff was a zemindar; and she being a *pardanashin*, her affairs were managed by her son. The suit related to a plot of land situated within two miles from her residence; it was formerly granted to a tenant for the erection of certain kucha buildings thereon, but the tenant having deserted, the plaintiff took possession of it; the defendants thereafter dispossessed her and having entered on the plot erected on it certain kutcha and pucka buildings without her consent. The plaintiff sued to eject the defendants and to remove the materials they had brought upon the land. The defendants among other pleas objected that in as much as the plaintiff had known of the erection of the house and had not interfered to prevent it, she must be

* *Vide* 1, Indian Law Reports, Allahabad Series, p. 82.

(1) 2, Mad. H. C. R., 114. (2) 2, Mad. H. C. R., 270.

taken to have acquiesced in it, and had thereby lost her right to the relief sought. The Lower Courts found that the plaintiff had through her son the means of knowing of the erection while in progress, and hence inferred her knowledge and from her knowledge and inaction, that she had tacitly consented to it and therefore dismissed the suit. The plaintiff appealed to the High Court.

The judgment of the Court (after setting out the facts of the case) was as follows:—

The rulings of the Sudder Court as to the effect of delay in the assertion of a right have been considerably modified or explained by more recent decisions of this Court, which have, however, we believe, escaped the observation of the reporter. We propose, therefore, in disposing of this case, to examine at somewhat greater length than we should have otherwise thought it necessary to do the principle on which the rule of estoppel *in pais* appears to rest, and the circumstances to which it should be applied. This rule has been stated generally in the following terms:—"If a man by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induced others to do that from which they might otherwise have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given credit to his words, or to the fair inference to be drawn from his conduct." And again:—"If a party has an interest to prevent an act being done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had it been done by his previous license."—*Cairncross* v. *Lorimer* (1).

Mr. Justice Story points out the principle on which the rule rests, and it is most important that the principle should be borne in mind in applying the rule:—

"This doctrine of estoppels *in pais*, or equitable estoppels, is based upon a fraudulent purpose, and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel. As if both parties were equally conusant of the facts, and the declaration, or silence, of the one party produced no change in the conduct of the other, he acting solely on his own judgment. There must be deception, and change of conduct in consequence, to estop the party from showing the truth."—

(1) 3, Macq. H. L. Cas., 829; 7, Jur., N. S., 149.

(Story's Equity Jurisprudence, vol. ii., s. 1543). Of course by fraud the author must be understood to mean whatever amounts in law to fraud.

In *Ramsden* v. *Dyson* (1) Lord Chancellor Cranworth and Lord Wensleydale declared that if a stranger builds on the land of another supposing it to be his own, and the owner does not interfere, but leaves him to go on, equity considers it dishonest in the owner to remain passive and afterwards to interfere and take the profit. But if a stranger builds on the land of another knowingly, there is no principle of equity which prevents the owner from insisting on having back his land, with all the additional value which the occupier has imprudently added to it; and Lord Wensleydale added that, if a tenant does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

These dicta of the highest authority illustrate the application of the general rule. There must be something more than a mere delay in instituting proceedings to deprive a man of his legal remedies. We are not, indeed, prepared to adopt without qualification an opinion thrown out by the High Court of Madras, "that the equitable doctrine of laches and acquiescence is not applicable to suits in the Mofussil for which a period of limitation is provided by the Limitation Act."—*Rama Rau* v. *Raja Rau* (2).

The rule as expounded by the authorities we have quoted is obviously founded on a highly equitable principle, and we see no reason why on fitting occasions it should not be applied in this country. No doubt a distinction must be made between those cases in which a suitor seeks some relief which, if he proves his case, the Court is bound to grant him, and the cases in which he seeks relief which the Court has discretion to grant or refuse. When a suitor has a right to demand relief, no doubt a stronger case must be made out against him than such mere tardiness in seeking a remedy which might justify a Court in refusing relief when it has a discretion to grant or refuse it. With this qualification we assent to the dictum of the Madras High Court in a case decided subsequently to *Rama Rau* v. *Raja Rau* (3) to the effect that "on the whole it may be taken as the law both of Courts of law and equity that mere laches, short of the period prescribed by the statute of limitation, is no bar whatever to the enforcement of a right absolutely vested in the plaintiffs at the period of suit."—*Peddamuthu-*

(1) L. R., 1, H. L., 129; 21, Jur., N. S., 506; 14, W. R., 926.

(2) 2, Mad. H. C. R., at p. 116. (3) 2, Mad. H. C. R., 114.

laty v. *N. Timma Reddy* (1); but where there is more than mere laches, where there is conduct or language inducing a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled in this country, as in other countries, to plead acquiescence, and the plea if sufficiently proved ought to be held a good answer to an action, although the plaintiff may have brought suit within the period prescribed by the law of limitation. In the case before us it has been found that the appellant, knowing that the respondent was building on her land, abstained from commencing proceedings for one or two years. The respondents have set up a title to the land which has been held to be manifestly false. They must have known they had no claim to it, and they could hardly have doubted it belonged to the zemindar. Had they thought it probable the zemindar would consent to their usurpation, they might have assured themselves on the point by applying to her before they expended a rupee on the land. Under the circumstances, we cannot hold that the delay in the institution of the suit is sufficient to deprive the appellant of her right to relief.

The appeal is decreed with costs, and so much of the decrees of the Courts below as dismissed the claim to the plot in question in this appeal are reversed, and the claim is decreed.

BOMBAY HIGH COURT.

The 8th December, 1875.

PRESENT:

The Hon'ble Mr. Justice West and Nanabhai Haridas, *Judges.*

REG *vs.* DEVAMA* and SOMSHEKHAR.

The Code of Criminal Procedure (Act X. of 1872*) ss.* 215 *and* 296*—Compounding of offences—Revival of Prosecution—" Dismissal" of a warrant case—Practice—Counsel.*

A warrant case of a nature not compoundable under s. 214 of the Indian Penal Code was "dismissed" on the parties coming to an amicable settlement.

***Held* that the "dismissal" was equivalent to a discharge under s. 215 of the Code of Criminal Procedure, and the composition did not affect the revival of the prosecution, if that should otherwise be thought necessary or expedient.**

Counsel cannot claim as of right to be heard on a reference to the High Court under s. 296 of the Criminal Procedure Code.

(1) 2, Mad. H. C. R., at p. 273.

* *Vide* 1, Indian Law Reports, Bombay Series, p. 64.

The following statement of the facts seems necessary :—

In the year 1874, a respectable lady named Subhadra, complained against one Devama and her son Somshekhar, that they broke into her residence and abstracted her ornaments to the value of Rs 7,000. Somshekhar asserted that he was the owner of the place as well as of the property as he was adopted by the complainant. The case was dismissed, the Magistrate recording the following order :—

" They (the parties) have now come to an agreement, and Subhadra has withdrawn her complaint on condition that she receives certain ornaments and a certain 'sari,' which the other party agree to give her. I have, therefore, given these articles to her, and the rest to Somshekhar and Devama, and I dismiss the case."

Subsequently disagreements having arisen an application was made to revive the prosecution and the case was sent to the High Court under Section 296 of the Code of Criminal Procedure Code.

Per Curiam.—The accusation made against the accused in this case constituted it a warrant case falling under the provisions of Sections 213 *et seq.* of the Code of Criminal Procedure. The Magistrate, Mr. Middleton, after an arrangement had been come to between the parties, divided the property between them and dismissed the complaint. By "dismiss the case" we understand the Magistrate to have meant the same thing as is indicated by Section 215 of the Code of Criminal Procedure, where it says that "the Magistrate, if he finds that no offence has been proved against the accused person, shall discharge him." "Dismissal of a complaint" is a phrase properly applicable only to a summons case under Chapter XVI. of the Code, and incapable of being applied, as Section 212 shows, to any complaint, "except in so far as it refers to a summons case." The provisions of Section 215 are highly useful in many cases. They enable a Magistrate, when circumstances make it expedient, to dispose of an accusation without proceeding to an actual conviction or acquittal where a strict application of the criminal law would be undesirable. But these provisions are open to abuse, and, to guard against their perversion, it is explained (Explanation II.) that a discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution. In the present case, therefore, the course pursued by Mr. Middleton, and which seemed to him the more just and expedient, does not bar the renewal of the proceedings, if to Mr. Jervoise or the Magistrate of the District such a renewal should appear absolutely necessary or highly desirable.

The composition entered into between the parties cannot affect the revival of the prosecution if that should otherwise be thought necessary. House-breaking in order to commit theft is not an offence which, according to Section 214, Penal Code, can be legally compounded, and a withdrawal from the prosecution in such a case has not, according to Section 188 of the Code of Criminal Procedure, the effect of an acquittal. Section 212 of the Criminal Procedure Code cannot be applied to the case, because it is not a summons case, and there is no such provision as that contained in Section 212 in the following chapter on warrant cases.

There is no occasion for any order on the part of this Court. The case stands free for the exercise of the Magistrate's discretion, which he will naturally not exercise to the supersession of his predecessor's order, unless it should appear that justice requires him to adopt that course.

SHORT NOTES.

CALCUTTA HIGH COURT.

Act XXVII. of 1860—*Review.*

A review of judgment is admissible in proceedings under Act XXVII. of 1860, although no express provisions for reviews are contained in the Act.

Vide 1, Indian Law Reports, Calcutta Series, p. 101, (Glover and Mitter, JJ). The 25th August, 1875—Poona Kooer (Petitioner.)

Appeal—Letters Patent, 1865, *cl.* 15—*Act VI. of* 1874—*Order granting Appeal to Privy Council.*

Under cl. 15 of the Letters Patent, no appeal lies to the High Court from an order of the Judge in the Privy Council Department, granting a Certificate that a case is a fit case for appeal to Her Majesty in Council.

Vide 1, Indian Law Reports, Calcutta Series, p. 102. (Macpherson, Offg. C. J., and Jackson, J). The 23rd June, 1875— Mowla Buksh.

Hindu Widow—Property purchased from the proceeds of the estate devised—Inheritance.

Where an estate was given to the widow with power to use the proceeds as she chose, it was *held* by the Privy Council that the pro-

ceeds or property purchased by her out of the proceeds would belong on her decease to her heirs.

Vide 1, Indian Law Reports, Calcutta Series, p. 104, Privy Council.—The 4th and 5th June, 1875—Bhagbuti Deye.

Hindu Law—Age of Majority of Hindus—Act XL. of 1858—*Unconscionable Agreement—Usury.*

A Hindu, resident and domiciled in Calcutta, and possessed of lands in the mofussil, borrowed in Calcutta a sum of money from the plaintiff, a professional money-lender, and agreed by his bond to repay the principal with interest at 36 per cent. per annum in Calcutta. The defendant's age, at the time he executed the bond, was sixteen years and one or two months; but neither his person nor his property had been taken charge of by the Court of Wards, or by any Civil Court. The defendant having made default in payment, the plaintiff brought the present suit. The defendant pleaded his minority.

Held by the Full Bench that the law as to the age of minority governing the case was not Act XL. of 1858, but the Hindu Law, under which the defendant was not a minor at the time he executed the bond, and that therefore he was liable on it.

On the merits of the case the lower Court (Phear, J.) found that the agreement was unconscionable, and one which a Court of Equity would not enforce. *Held* by the appeal Court (Garth, C. J., and Macpherson, J.,) in accordance with the decision of Phear, J., that the plaintiff was only entitled to a decree for the amount actually received by the defendant from him, with interest at 6 per cent.

Vide 1, Indian Law Reports, Calcutta Series, p. 108. Full Bench (Sir R. Garth, C. J. and Jackson, Macpherson, Markby and Glover, JJ.) The 30th November and 2nd December, 1875.—Mothoormohun Roy *vs.* Soorendronarain Deb.

Appeal—Act XXVII. of 1860—*Deposit of Security by Person entitled to a Certificate.*

No appeal lies under Act XXVII. of 1860 on a question of the deposit of security by a person who has been declared entitled to a certificate under the Act.

Vide 1, Indian Law Reports, Calcutta Series, p. 127 (Glover and Mitter, JJ). The 20th August, 1875—Monmohenee Dossee.

BOMBAY HIGH COURT.

Hindu Law—Decree—Interest—Rule of 'damdupat', not applicable to amounts due on decrees.

The rule of Hindu Law, which limits the amount recoverable at one time by way of interest to the amount of the principal, does not apply to an amount recoverable in execution of the decree of a Civil Court.

Vide 1, Indian Law Reports, Bombay Series, p. 73. (West and Nanabhai Haridas, JJ.) The 15th December, 1875—Balkrishna Bhai Chandra *vs.* Gopal Raghunath.

Kabuláyatdar Khot—Dharekaris—Occupant—Bombay Act I. of 1865, *s.* 2, *Cls. J, K, and L., and Section* 48—*Regulation XVII. of* 1827, *s.* 3, *Cl.* 1, *and Section* 5, *Cl.* 2—*Inferior and Superior Holder—Privity of Estate.*

Regulation XVII. of 1827, s. 5, enables the Government, and therefore, the holder of the rights of Government, on failure of the superior holder to pay the land revenue, to realize it from the inferior holder.

The laws for realizing the land revenue establish a kind of privity of estate between the superior and inferior holders, by which the latter, taking the profits of the land, must satisfy the obligations of the former to Government, independently of, and even in opposition to, any agreement between the two contracting parties. The liability to pay, adheres to the occupation and enjoyment, and cannot be got rid of, except through its resignation by the sovereign or the sovereign's representatives.

Held, accordingly, that when the person who was the "occupant" of certain land within the meaning of the Bombay Survey Act failed to pay the revenue due thereon, the *Kabuláyatdar Khot* might recover the amount from that person's mortgagee in possession.

Vide 1, Indian Law Reports, Bombay Series, p. 70 (West and Nanabhai Haridas, JJ). The 30th November, 1875—Krishnaji Ravji Godbole *vs.* Ram Chundra Sadashiv.

Registration—Act XX. of 1866. *ss.* 17 *and* 18—*Deed of Partition.*

Section 17 of Act XX. of 1866 extends to a deed of partition, and this is not prevented by such an instrument being enumerated in s. 18 amongst those which are optionally registrable.

Vide 1, Indian Law Reports, Bombay Series, p. 67, (West and Nanabhai Haridas, JJ.) The 14th December, 1875.—Shankar Ram Chundra *vs.* Vishnu Anant.

Limitation—Decree—Execution—Application—Act XIV. of 1859—*Act IX. of* 1871.

An application for execution of a decree was made in February 1868, and proceedings sufficient to bar limitation under Act XIV. of 1859 were going on till 30th September 1871. The next application for execution of the decree made in October 1872 was held to be barred under Act IX. of 1871, as more than three years had elapsed on that day from the date of the application in February 1868.

Held also, following *Gouree Sankar vs. Arman Ali* (21, W. R., 309), that an informal application, made on the 30th September 1871, in the nature of a petition to the Subordinate Judge to give effect to the application of February 1868 by overruling certain objections of the Collector and enforcing execution of the decree, was not an application for the execution of a decree such as could bar limitation under Act IX. of 1871.

Vide 1, Indian Law Reports, Bombay Series, p. 59, (West and Nanabhai Haridas, JJ.) The 6th December, 1875—Jibhai Mahipati *vs.* Parbhu Bapu.

HIGH COURT, N. W. P.

Act VIII. of 1859, *s.* 2—*Res judicata.*

When a plaintiff claims an estate, and the defendant, being in possession, and knowing that has two grounds of defence raises only one, he shall not, in the event of the plaintiff obtaining a decree, be permitted to sue on the other ground to recover possession from the plaintiff. (Woomatora Debia, 11, B. L. R., (P. C.) 158).

Where, therefore, the defendants purchased an estate in the plaintiff's possession and sued him to recover possession of it, and the plaintiff resisted the suit merely on the ground that he was the auction-purchaser of it, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property, a claim which he might have asserted in reply to the former suit, *held* that he was debarred from suing to enforce such claim.

Vide 1, Indian Law Reports, Allahabad Series, p. 75, (Turner, Offg. C. J., and Spankie, J.) The 20th August, 1875—Baldeo Sahai *vs.* Bateshar Singh.

Mitakshara—Hindu Law—Undivided Hindu Family—Ancestral Immoveable Property—Rights of father and son.

The sons in an undivided Hindu family, although they have a proprietary right in the paternal and ancestral estate, have not independent dominion.

Where, therefore, the plaintiff sued to eject the defendant, his son, from a portion of a house, partly self-acquired by the plaintiff and partly ancestral property, in which the defendant was living against the plaintiff's will, the Court decreed the claim.

Vide 1, Indian Law Reports, Allahabad Series, p. 77, (Turner, Offg. C. J. and Oldfield, J.) The 26th August, 1875—Baldeo Das *vs.* Sham Lal.

Contract—Act IX. of 1872, *s.* 72—*Liability of Person to whom Money is paid by Mistake.*

A treasury officer, under the imposition of a gross fraud, paid money to the defendant, who was the innocent agent of the person who contrived the fraud. In paying the money the treasury officer neglected no reasonable precaution, nor was he in any way guilty of carelessness.

Held that the defendant was bound to repay the money received by him, and that he could not defend himself by the plea that he had paid it to his principal: nor could the Court allow that the circumstances that the principal was himself a servant of the plaintiff, and in the course of his employment obtained facilities for committing the fraud, relieved the defendant from his liability.

vide 1, Indian Law Reports, Allahabad Series, p. 79, (Turner, Offg. C. J. and Oldfield, J.) The 26th August, 1875—Shugan Chand *vs.* The Government, N. D. W.

Carrier—Duty of Persons sending goods of a dangerous nature—Noitce—Act XVIII. of 1854, *s.* 15—*Act XIII. of* 1855—*Negligence—Action for Compensation for destruction of life.*

Held (Pearson, J. dissenting) that a person who sends an article of a dangerous and explosive nature to a Railway Company to be carried by such Company, without notifying to the servants of the Company the dangerous nature of the article, is liable for the consequences of an explosion, whether it occurs in a manner which he could have foreseen as probable, or not.

Held, also (Pearson, J. dissenting), that such a person is liable for the consequences of an explosion occurring in a manner which he could not have foreseen, if he omits to take reasonable precautions to preclude the risk of explosion.

Mode of estimating damages under Act XIII. of 1855 *discussed.*

Vide 1, Indian Law Reports, Allahabad Series, p. 60 (Stuart, C. J., and Pearson, Turner, Spankie and Oldfield, JJ.) The 1st June, 1875—Lyell *vs.* Ganga Dai.

ON COLEBROOKE'S TRANSLATION OF THE DÁYA-BHÁGA.

The treatise with which we have headed this article has formed, since it was published, we believe towards the end of the last century, the main authority for that branch of the Hindu law of inheritance which obtains among the people of Bengal. By 'authority' we mean the source from which the law is drawn as it is judicially administered in the Courts established by the British Government. That it has given a generally correct version of the celebrated work of Jimútavá-hana, there is no denial: nor would the outline of the Bengal law of inheritance, which may be deduced from a study of the translation be conspicuously erroneous. But if any one tolerably acquainted with that peculiar style which has been adopted by the writers of institutes of law in Sanscrit, compares the translation of Colebrooke with the original, he will find some reasons for being dissatisfied with the translation. It ought to be remembered, that in Sanscrit, style or phraseology varies far more in the different branches of learning than it seems to do in other languages, for instance in English. Thus one pretty well conversant with what are called the Belle-Lettres in Sanscrit, the works of the poets and of such prose writers as these are, and works on Rhetoric or the Art of Poetry need not be ashamed if he does not understand a page of any work on Philosophy, Logic or Law; for Sanscrit is an extremely cultivated language, and every branch of learning, such as Poetry, Rhetoric, Logic, Metaphysics, Grammar and so forth, has been so minutely systematised that no one uninitiated in the rudiments or rather in the main features of a particular branch can make any thing out of a special treatise on that branch, from his general knowledge of the Sanscrit language and literature. Thus Professor Max Müller of England is an unrivalled Vedik Scholar; but it would be no wonder, nor would it be any depreciation of his vast knowledge of Sanscrit, if he were found tripping in a simple verse from Kalidasa. In the same manner, Sanscrit law is a particular study; that a man is a good scholar in Sanscrit Poetry or Sanscrit Logic or Philosophy would be no testimony to his ability to grapple with the problems of Hindu Law; unless indeed he has had good instruction and taken the pains of learning the subject by the help of a teacher. People ordinarily overlook this circumstance; although they are keenly alive to the absurdity of a good Shakespear reader or a good scholar in mentad philosophy

setting up as a lecturer on Blackstone or on the statute law of England. As regards Sanscrit law the absurdity would be greater, for in English a good general scholar would find little difficulty in understanding Blackstone or the language of the modern statutes at least; whereas a good scholar in Sanscrit literature would find it rather tough, to get at the meaning of even the first twenty lines of the Dáya-bhága of Jímúta-váhana.

It is not the intention of the foregoing remarks to imply that Colebrooke had not studied to very good purpose the Sanscrit Law books. On the contrary, our impression is, that he had very good instruction, and that even while writing his valued compilations of Hindu Law, he constantly had at his elbow competent Pundits to explain to him the difficult passages and the technical terms. But these Pundits being unacquainted with the English, they had no means of verifying what was reproduced in English at their suggestion or by their instruction. Thus slight errors have crept in in the translation, and although the substance generally of the paragraphs into which the translator of the Dáya-bhága divided the treatise for the sake of easy reference, has been pretty correctly given, it would not be an exaggeration to say that the manner of the original is hardly maintained sufficiently for the purpose of keeping the reader constantly on the watch that he is reading a work which was not English originally and that he must be cautious how he understands the meaning of the expressions occurring in the work.

It must also be recollected that in the days when Colebrooke wrote, the reading of the Europeans in Sanscrit had not much advanced, and the advantages of mutual help and mutual criticism among different scholars were altogether wanting. Thus a solitary scholar, translating a work on an abstruse subject in a strange and hitherto unknown and very difficult language would be likely to fail in fulfiling all the requirements of a proper translation. Especially a law-book, which is intended to be put to practical use in judicial administration, would seem to require a very cautious and careful handling. The Dáya-bhága of Jímútaváhana has become something like a statute on the Bengal law of inheritance. In the administration of that law by the Courts of Bengal every word and every sentence in it may be weighed and pondered and subjected to contradictory interpretations as the words of a statute are. Thus the simple definition of what 'gift' is, contained in the above work, has been converted by the ingenuity of Sir Barne

Peacock into a lever for overturning the whole fabric of Bengal testamentary law; though we do not mean to insinuate hereby that the doctrine for the first time propounded by the late Chief Justice is not correct according to the true principles of Hindu law. However that be, what we were going to observe was this that considering to what a minute and jealous interpretation the words of the Dáya-bhága are liable to be subjected, the translation of Colebrooke is not a sufficiently precise representation of what is to be found in the original. No one would miss the absurdity and ridiculousness of an old class Munsif who does not know English descanting elaborately on the expressions of his Bengali Civil Procedure Code, and interpreting the same into bold propositions of Procedure Law; yet, the quality of training apart, a European Judge not knowing Sanscrit is hardly in a more advantageous position as regards Hindu Law than our imaginary Munsif is as regards Procedure Law. But the absurdity becomes still more glaring if the translation upon the basis of which the constructions of Hindu Law are made is evidently not a very close one, nor professes to give anything but the substance of the original.

That Colebrooke's translation is liable to the above observations we might verify if we compare only a few pages of it with the original. But sometimes the translation is defective in more serious points; in fact, it is positively erroneous, and would cause a perversion of the substantive law. By a brief search we have gathered what we give below as instances of the inaccuracies of Colebrooke's translation of Jímúta-váhana's Dáya-bhága.

Chapter V., para. 7, enumerates some of the persons who are disqualified for inheritance. Among them are those who are called in Sanscrit Nirindriya, which word Colebrooke has translated as "persons who have lost a sense." This is evidently inaccurate. The word 'Nirindriya' means, as every body knows, 'a person without a sense;' it does not imply that he once had that sense, and then lost it. Thus it might be contended, according to Colebrooke's translation, that a person who is born without a sense is not disqualified. It is true that such cases do not often arise; but that is no reason why law should be inaccurately laid down.

Again Chapter XI, Section 1, para. 64. This is the translation given of a text of Narada. "When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property and care of herself, as well as in her maintenance, they have full

power." Now what has been rendered as 'care of herself' should be 'care of the wealth.' According to Colebrooke's translation one might suppose that the husband's kin are entitled to the custody of her person.

Chapter XI., Section 1, para 2.

The late Mr. Justice Dwarkanath Mitter pointed out that two words *patibrata* and *sadhwi*, i. e.,—'devoted to husband' and 'chaste' have been altogether slurred over in the portion which begins

"Dying before her husband, a virtuous wife &c. &c". *Vide* 19, W. R., 372.

We do not mean to say that this has led to the decision of the great unchastity case in the manner the Full Bench have decided it; but what we cannot but suppose is that such inaccuracies, if often repeated, tend to engender wrong ideas as to the views of the Hindu Lawgivers in the mind of those who have no access to the original.

Chapter IV., Section 3, para. 29.

"Therefore the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father." Here "If she be dead" is the rendering of what ought to have been "In default of the mother". In Sanscrit, the word is 'abháva' or 'failure', and includes any kind of failure, whether by death, or by degradation or by relinquishment of the world. According to Colebrooke's translation, one might contend, that as regards the succession of the mother to her daughter's Stridhun, her right does not cease by her relinquishing the world or by being degraded. It would not do to say that degradation has ceased to have any effect on proprietary rights since the passing of Act XXI. of 1850; or that relinquishment of the world would be hardly allowed by the Courts of these days to have its declared legal effects. Whatever may be the legitimate results of later enactments or later decisions, they ought not to obtain colour from erroneous translations of the original writings on Hindu Law.

In para. 31 of the same chapter, same section, we find, "If there be no issue of their bodies, nor son of a rival wife, nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property." Here, what has been rendered as "issue of their bodies" is in Sanscrit the well known *aurasa* son. Now, a son would not be called *aurása*, unless he be legitimate offspring, *Vide* Manu (IX., 166); but there is no indication in the translation of that qualification. "Issue of their bodies" might be construed as any issue, legitimate or illegitimate; that it would be repugnant to Hindu feelings, that it would be against

the spirit of the manners and customs, and views and ideas of the Hindu Society, would not receive any very great consideration as a *ratio decidendi* in the eyes of the Judges of these days.

The above are but a small proportion of what might be pointed out as grave shortcomings in Colebrooke's translation of the Dáya-bhága. It is apparent that in the days of Colebrooke, translations from Sanscrit were not subjected to such canons of criticism as have latterly obtained currency. We would not hesitate to say that if Max Müller were set to examine Colebrooke's translation of the Dáya-bhága, he would hardly express satisfaction with it; this we gather from the very careful manner in which he has rendered even very insignificant scraps of Sanscrit metrical composition, which he had occasion to quote in his works relating to Sanscrit language and literature. As to Goldstücker he did speak forth; had he been living now, he would most probably have undertaken a recast of the Dharmasastra compilations, and we doubt not that he would have performed the task in a most satisfactory manner. His laborious and painstaking study of the Grammar of Panini, and his extensive readings in the Mimánsa literature had been just the kind of previous training, which would have most stood him in stead in the performance of such a task. The Mimánsa works are the repository of the rules of interpretation in Sanscrit; the authors of Digest in Sanscrit are fond of illustrating their doctrines by citing those rules. Few would have been more at home in such passages of the Sanscrit Digests and Commentaries as contain allusions to the rules of Mimánsa. It is to be regretted therefore that the project of Goldstücker has been cut short by his untimely death. It is high time however, that some means should be adopted to point out how far the current translations of Hindu Law are not the exact copies of what is contained in the original. It is much to be desired that some competent man should undertake the task, even if it be in the way in which Hughton revised the translation of Manu by Sir William Jones.

PRIVY COUNCIL.

The 11*th November*, 1875.

PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith and Sir R. P. Collier.

On Appeal from the Calcutta High Court.

KRISHNA BEHARI ROY* (Plaintiff) *Appellant,*

vs.

BUNWARI LALL ROY and another (Defendants) *Respondents.*

Act VIII. of 1859, *s.* 2—*Cause of Action*—*Res Judicata.*

B, as adopted son and heir of G, instituted a suit to set aside certain putni leases, under which certain persons claimed to hold lands which had belonged to G. The defence was, that B was not the legally adopted son of G, and an issue on this point having been settled, K, who claimed to be the reversionary heir of G, was made a defendant under s. 73 of Act VIII. of 1859; and it was eventually decided in that suit that B was the duly adopted son of G. *Held* that a subsequent suit by K against B to set aside the adoption could not, on the principles laid down in the case of Soorjeemonee Davee *vs.* Suddanund Mohapatter (12, B. L. R., p. 304), be maintained.

Kriparam *vs.* Bhagwan Doss (1, B. L. R., A. C., 68) over-ruled.

SIR M. E. SMITH.—This was a suit brought by the appellant, claiming to be the heir of Goursoondur Roy, to set aside an adoption of the respondent Bunwari Lall, alleged to have been made by the widow of Goursoondur Roy. One of the defences set up by Bunwari Lall and by his mother, who was joined in the suit as a defendant, was that the question of the validity of the adoption of Bunwari Lall had been already decided in a former suit, to which the present appellant Krishna Behary Roy was a party. An issue was raised upon that defence. Now it appears that a former suit had occurred which was of this nature; Bunwari Lall had brought an action against some patnidars who claimed under patni leases granted by his adoptive mother. The ground on which he sought to set aside the leases was, that she had exceeded her power in granting them, inasmuch as she had only a widow's estate. It is not necessary to state more respecting the object of that suit. An issue was raised in it upon the question whether Bunwari Lall had been validly adopted. The present appellant and plaintiff Krishna Behari Roy intervened in that suit, upon the ground that he was the heir of Goursoondur Roy, and, as the heir, had a right to intervene to dispute the title of Bunwari Lall as his adopted son. It does not appear very

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 144.

clearly at what period of the suit that issue was raised—whether before or after Krishna Behari Roy intervened—but undoubtedly it was raised, and is in substance the same as the issue raised in the present suit. The issue was tried, and the Principal Sudder Ameen found against the intervener and in favor of the adoption. He also found in favor of the patnidar that the patni could not be set aside. The patnidar having a decision in his favor, was, of course, satisfied with that decree, but Krishna Behary Roy being dissatisfied with the finding upon the issue as to the adoption, appealed to the Civil Judge. On this appeal the decision of the Principal Sudder Ameen was affirmed. Again he appealed from the Civil Judge to the High Court, which, after fully hearing the case upon the issue of adoption, affirmed the decisions of the Courts below. There exists, therefore, a final and complete judgment upon the issue raised either at the instance of Krishna Behary Roy, or which he adopted, on the very question which he seeks again to raise in this suit.

Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they are wrong, in as much as it is said, that the case does not come within s. 2 of Act VIII. of 1859. Now the section is this:—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." Their Lordships are of opinion that the expression "cause of action" cannot be taken in its literal and most restricted sense. But however that may be, by the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them.

It is not necessary for their Lordships to go at length into the reasons for their decision, because those reasons appear in a recent judgment of this Board in the case of *Soorjeemonee Dayee* vs. *Suddanund Mahapater*. In that judgment it is said, after reference to the second clause of Act VIII, "Their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property

be dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata,* founded on the principle *'nemo debet bis vexari pro eâdem causâ.'* This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred of *Gregory* vs. *Molesworth,* in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingston.*"

A decision of the High Court of Bengal has been referred to, the case of *Kriparam* vs. *Bhagwan Doss,* as having a contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which they have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it.

On reference to some notes of Mr. Broughton on this section of Act VIII. of 1859, it appears that the decisions have not been uniform in the Courts in India. Several of them are opposed to that referred to.

It was suggested by Mr. Cave that the former judgment ought not to be binding, because certain witnesses having been examined before the present appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals which were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that they cannot affect the operation of the final judgment, which must be taken to have been rightly given.

In the result, their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgments below with costs.

PRIVY COUNCIL.

The 2nd and 3rd July, 1875.

PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

On Appeal from the Calcutta High Court.

BAIJUN DOOBEY* and others (Defendants) *Appellants,*

versus

BRIJ BHOOKUN LALL AWASTI (Plaintiff) *Respondent.*

Hindu Widow—Sale of Right, Title, and Interest of Widow—Execution of Decree—Arrears of Maintenance—Rights acquired by Auction-Purchaser.

C, a Hindu, inherited from his father property charged, under the Mitakshara law, with the maintenance of *N*, his mother. *C* dying without issue, his property passed to *D*, his widow, who allowed the maintenance of *N* to fall into arrears. *N* brought a suit against *D* personally for the amount of the arrears, and obtained a money decree, in execution of which, *D's* right, title and interest in the property left by her husband were sold. Neither the decree nor the sale proceedings declared the property itself to be liable for the debt. In a suit by the reversionary heir of *C*, after the death of *D*, to establish his right of inheritance to, and to recover possession of, *C's* estate, *Held* that the purchaser at the execution-sale took only the widow's interest, and not the absolute estate, and therefore the plaintiff was entitled to recover.

SIR B. PEACOCK.—This is a suit brought by Brij Bhookun Lall against Baijun Doobey, to declare his right to the inheritance of Lot Moranwan and to obtain possession of that estate. The plaintiff claims the estate by right of inheritance from Chintamun as reversionary heir after the death of Doorga Konwar, the widow of Chintamun. The defendant claims by purchase under an execution of a decree against Doorga, the widow, and the question is, whether, under that decree, only the widow's interest or the absolute estate was sold. If only the widow's interest, then upon the death of the widow the plaintiff succeeded to the estate as reversionary heir of Chintamun, and is entitled to recover; if, on the other hand, the whole interest passed under the sale, then the plaintiff as reversionary heir upon the death of the widow took no interest, but the estate passed to the defendant Baijun by reason of his purchase under the decree.

Now it appears that Sheo Churn and Muddun Mohun two brothers, the sons of Deo Kishen, separated in estate. Muddun Mohun took

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 133.

one share of the estate and Sheo Churn the other. Muddun Mohun therefore obtained a separate estate. The lands are situate in the District of Gya, and are subject to the rules of the Mitakshara law. Muddun Mohun having got this separate estate died leaving two sons, Balgobind and Chintamun; Balgobind died childless, and the whole estate came to Chintamun. Chintamun consequently acquired the estate by inheritance, and it was ancestral estate derived from the father, Muddun Mohun. Chintamun died childless, leaving two widows, Doorga Konwar and Radha Konwar. Muddun Mohun, the father, left a widow, who was the mother of Chintamun. The mother, Net Konwar, the widow of Muddun Mohun, was entitled to be maintained out of the estate held by Chintamun. The maintenance of Net Konwar, the widow of Muddun Mohun, was a charge upon the inheritance which came from Muddun Mohun. The liability to maintain the mother passed to Chintamun when he got the estate of his father, and when the estate passed from Chintamun to his widow, the liability to maintain Net Konwar still attached to the inheritance, and Doorga was bound to maintain her out of the inheritance. It appears that she allowed the maintenance of the mother, which had been fixed by the two brothers at Rs. 200 a year, to fall into arrear for about five years, making Rs. 1,000 for the five years. In consequence Net Konwar brought a suit against her personally for the amount due for maintenance with interest.

The plaintiff obtained a decree, whereby it was ordered that the plaintiff should recover from the defendant on account of her claim Sicca Rs. 1,033-5-6, which is equivalent to Co.'s Rupees 1,102-3-6. The plaint prayed that the defendant be ordered to pay that amount, and by the decree it was ordered that the plaintiff do get from the defendant that amount.

Now the decree being a personal decree against the widow, according to the case of *Kistomoyee Dossee* vs. *Prosunno Narain Chowdry* (6, W. R, 304), all that would be sold under it was the interest of the widow. It was there held that where only the rights and interests of a Hindu widow in the property left by her husband were sold in execution of a decree against her on account of a debt contracted by her, and neither the decree nor the sale proceedings declared the property itself liable for the debt; the purchaser obtained an interest in the estate only during the widow's life-time. This was a personal debt of the widow, and there is nothing to show that the estate of Muddun Mohun was charged by the decree. The sale against her in discharge of her per-

sonal liability was of the interest which belonged to her, and not of the estate which belonged to her husband. It was the widow's property only that was liable to be sold, or was sold, in discharge of her personal debt.

The notification of the sale under the decree was that a sale would be held of whatever right and interest the judgment-debtor had in the estates. It does not say that it is to be levied by sale of the husband's assets, but that it is to be realized by the sale "of whatever right and interest the judgment-debtor had in the estate." Then it is specifically pointed out: "Besides the right and interest of the judgment-debtor the right and interest of no other person will be sold at the said auction." The right and interest of the judgment-debtor which was to be sold, was that to which she was entitled, that which was liable to make good her default in non-payment of the maintenance. The sale took place under that notification, and it is clear, if that is important, that Brij Bhookun, the plaintiff, understood that what was to be sold was the widow's estate, not his own reversionary interest as the heir of his uncle. He wanted to sell the widow's estate, not his own interest. The real question is what was liable to be sold under the decree, and what in fact was sold. The purchaser may have made a mistake. He may have thought that the Court was selling something which they did not sell, but he was informed distinctly by the notification that the Court was selling the interest of the defendant in the estate, and that besides that interest no other interest was being sold. The appellant having purchased the interest of the judgment-debtor, obtained a certificate of the purchase, which stated that whatever right, title, and interest the judgment-debtor had in the said property had ceased from the date of the sale, and had become vested in the auction-purchaser.

It appears therefore to their Lordships that what was intended to be sold was the widow's interest only and not the absolute estate in the lot, and that, consequently, upon the death of the widow, the lot descended to the plaintiff as the reversionary heir of her husband, and that the purchaser did not obtain the absolute estate, but only the widow's interest in it, which continued only so long as the widow lived.

Several cases have been cited. The first case which was referred to was the case of *Ishan Chunder Mitter* vs. *Buksh Ali Sowdagur* (Mar., 614). That case was fully gone into, and it was explained in the course of the argument that the suit was against the widow not in her own right as widow, but as representative of her son. In that case the widow had no

estate at all to be sold, and when the decree and the order for sale are examined, it is clear that what was intended was the sale of the interest of the debtor: that was the interest of the son to whom the widow was the guardian; and when it was said that the interest of the defendant was sold, the widow's interest was not intended, but the interest of the person who was liable, and that was the son. That decision was referred to and approved by this Board in the case of *The Manager of the Darbhanga Raj* vs. *Moharajah Coomar Ramaput Sing* (10, B. L. R, 294). It appears to their Lordships that those cases are no authorities to show that, under the judgment and execution in this case, anything further passed to the purchaser than the widow's interest. Then two cases were cited, one *Tiluck Chunder Chuckerbutty* vs. *Muddun Mohun Jogee* (15, B. L. R., 143). That was a very different case from the present. It was there held, that "where a widow's estate is sold for arrears of rent, it is not merely the widow's life-interest that is transferred, and the reversionary heir cannot follow the estate after her death." There the widow was sued for rent under Act X. of 1859. S. 105 of that Act enacts that, "if the decree be for an arrear of rent due in respect of an under-tenure which by the title-deeds or the custom of the country is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree." The rent was due to the landlord. He recovered a decree, and under it the tenure, not the widow's interest, was sold.

The other case which was cited was *Anund Moyee Dosse* vs. *Mohendro Narain Doss* (15, W. R., 264). That was the case of a suit brought for arrears of rent. It was there held, that "when neither the Hindu widow who has succeeded by inheritance, nor the reversioner, chooses to pay the arrears of rent which have fallen due upon a tenure, the tenure, if sold for such arrears, passes to the purchaser by the sale;" that is to say, if the rent is not paid, the tenure is answerable, and the landlord has a right to look to the tenure. Those cases therefore are not at all applicable to the present and are no authorities in favor of the defendants.

Then another case was cited which, in their Lordships' opinion, bears out the position already laid down. It is *Nogendro Chunder Ghose* vs. *Sreemuttee Kaminee Dossee* (11, Moore's I. A., 241). It was there held that the decree in that case was not a decree against the land but a personal decree. It bears out the view which their Lordships have taken with regard to this decree, that it was a decree in a suit against the widow personally; that the decree was against her personally; that

the attachment was to sell her property, that is, the interest which belonged to her in the estate, and which was liable to make good her default.

Looking, therefore, to the whole case, their Lordships are of opinion that the decision of the High Court was correct, and they will humbly recommend Her Majesty that that decree be affirmed, with costs of this appeal.

MOFUSSIL PLEADERS.

Mr. Justice L. S. Jackson of the Calcutta High Court, in speaking of Mofussil Pleaders, said* "In England, no doubt, the law is that parties are bound not merely by admissions, but by the view taken of their cases, and the mode of conducting them by their counsel at the trial.

In the Mofussil Courts, no doubt, particular acts done within the conditions of the vakalutnamah, and admissions of fact by the pleader, are binding on the client,† but we cannot hold that the client is bound by the mistaken consent of his pleader to abide by issues of law erroneously framed by the Judge, and not properly arising in the case.

There is but a slight analogy between a Barrister in English Courts of Justice and a Mofussil Pleader.

The former is usually entrusted with the conduct of a cause (through an attorney), by reason of his learning and ability; he is responsible to the Court, and to the profession of which he is a member, for his professional conduct, and he has well-known privileges and immunities.

The Vakeel is simply the representative of the suitor, possessed of his personal confidence, and in direct communication with him, but having neither in theory nor in fact the learning and the varied experience of the English Barrister.

The pleader is presumably well acquainted with the facts of the case in which he is employed, and he is bound to an honest care for his client's interest; but although of late years efforts have been made to ensure his having a rudimentary knowledge of the law, it is certain that those efforts have been only partially successful, and especially that no rule of practice can be laid down which is based on the presumed legal science of the Mofussil practitioner.

I say Mofussil practitioner, because these observations are not meant to apply to the Native Bar in the Appellate High Court, nor do

* 2, Wym. Rep., Civil Rulings, p. 173.

† See cases cited in Macpherson's Civil Procedure, 4th edition, page 409, notes A. & C.

I deny there are honorable exceptions even in the interior ; but any one who is at all acquainted with the Mofussil Courts, is aware that, generally speaking, the possession of the commonest text books by pleaders there is quite exceptional, and it might be possible to find some who are not even possessed of the Act VIII. itself.

Regulation XI. of 1806, Section 12, Clause 2 (which appears to be still in force), directs the Zillah Judges to require the Native pleaders of their respective Courts to take copies of the translation of any Regulations which relate, directly or indirectly, to the administration of civil justice.

And Regulation XXVII. of 1814, Section 40 (repealed only last year by Act XX. of 1865), contained the following provision :—'That the pleaders in the several Courts, as well as other persons, may have it in their power to render themselves acquainted with the Regulations enacted by the British Government, there shall be kept, for public inspection in the several Courts of Judicature, printed copies of all such Regulations and of the translations in the native languages. And on receipt of the translation of the Regulations in the country languages, the Courts of Justice were to cause them to be publicly read, and to require the native pleaders to take copies,' &c., &c.

And very mainly, no doubt for this reason, the Legislature has, in the Code of Civil Procedure, imposed upon the Courts themselves the responsibility of conducting suits in every stage.

Emphatically so as to the framing of issues, which, under the present as well as the former procedure, is exclusively the business of the Court.

By Section 38, Act XXIII. of 1861, the procedure prescribed by Act VIII. of 1859, is to be followed, as far as it can be, in all miscellaneous cases and proceedings which, after the passing of the Act, may be instituted in any Court.

The mode in which issues are to be framed under that Act is to be found in the Sections 139—141,* which clearly shew that this is exclusively the function of the Court. Section 139 declares that the Court may frame the issues from the allegations of fact which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference, &c. This clearly shews that the pleader may bind his client by a statement of matter of facts, but nothing is said of issues or admissions of law."

* The only cases in which the issues are not directly framed by the Court are those provided for by Sections 142 and 143.

SHORT NOTES.

CALCUTTA HIGH COURT.

Bills of Exchange Act (V. of 1866*)—Suit on Promissory Note payable by Instalments.*

Where a promissory note is payable by instalments, and contains a stipulation that, on default in payment of the first instalment, the whole amount is to become due, a suit to recover the whole amount on default made in payment of the first instalment cannot be brought under Act V. of 1866.

Vide 1, Indian Law Reports, Calcutta Series, p. 130. (Phear, J.) The 12th January, 1876—Remfry *vs.* Shillingford.

Appeal to Privy Council—Dismissal of Appeal for Default in Deposit of Security, and in transcribing Record—Act VI. of 1874, *ss.* 11, 14 *and* 15.

On an application to stay proceedings in an appeal to the Privy Council, which had been presented on the 2nd July 1874 from a decision of the High Court on its Original Side, it appeared that no deposit had been made by the appellant to defray the costs of transcribing, &c., as provided by s. 11, Act VI. of 1874; that no steps had been taken to prosecute the appeal; and that no security had been deposited for the costs of the respondent, since the petition of appeal was presented. The Court granted a rule calling on the appellant to show cause why the proceedings on appeal should not be stayed, and on his not appearing to show cause, ordered that the appeal should be struck off the file.

Vide 1, Indian Law Reports, Calcutta Series, p. 142. (Phear, J). The 24th January, 1876.—Thakoor Kapalinath Shahai *vs.* The Government.

Succession Act (X. of 1865) *s.* 56*—Revocation of Will—Lawful Polygamous Marriage.*

The will of a Jew, made subsequently to his first marriage, but previously to a second marriage in the life-time of his first wife, *held* to be revoked by such second marriage under s. 56 of the Succession Act.

Vide 1, Indian Law Reports, Calcutta Series, p. 148. (Phear, J.) The 13th December, 1875—Gabriel *vs.* Mordakai.

Succession Act (X. of 1865) *s.* 258*—Grant of Letters of Administration with Will annexed—Practice.*

Letters of administration with the will annexed may, under s. 258 of the Succession Act, be granted after the expiration of seven clear days from the death of the testator.

Vide 1, Indian Law Reports, Calcutta Series, p. 149. (Phear, J.) The 1st February, 1876.—*In the case of Willson deceased.*

Will, Attestation of—Succession Act (X. of 1865) *s.* 50—*Hindu Wills Act (XXI. of* 1870) *s.* 2.

By the Succession Act, s. 50, no particular form of attestation is necessary: therefore, where to a document purporting to be her last will and testament the name of a testatrix was written by A, and the testatrix then, in his presence, affixed her mark, and A in her presence wrote beneath it, "by the pen of A;" and the testatrix was then identified to the Registrar, who was present, by B, who had seen her affix her mark to the document, and who in her presence put his signature as having identified her, *Held* a sufficient attestation, and probote was granted.

Vide 1, Indian Law Reports, Calcutta Series, p. 150. (Phear, J.) The 20th and 22nd December, 1875—*In the goods of Roymoney Dossee.*

BOMBAY HIGH COURT.

Court Fees Act VII. of 1870, *s.* 16—*Pauper Respondent—Memorandum of Objections—Civil Procedure Code (Act VIII. of* 1859) *s.* 348—*Pensions Act XXIII. of* 1871, *ss.* 4, 5, 6, 8, 9 *and* 14—*Certificate by Collector.*

A pauper respondent is not entitled to present objections at the trial of an appeal without payment of stamp duty.

S. 4 of the Pensions Act XXIII. of 1871 debars the Civil Court from taking cognizance of any suit, whether the Government is a party to it or not, which relates to any pension or grant of money or land revenue conferred or made by the British or any former Government—without a certificate from the Collector or other authorized officer. Section 5 prescribes a remedy for the claimant of such pension or grant, and section 6 enables the revenue officer to refer the parties to the Civil Court for the determination of their respective interests in the income or other benefit, which the executive will, however, still, as against either or both of the litigants, be at liberty to allow or to withhold.

Lands held free of assessment under a grant from Government, which bestows on the grantee the lands themselves and not merely the Government revenue arising from them, do not fall within the provisions of the Pensions Act.

Vide 1, Indian Law Reports, Bombay Series, p. 75. (West and Nanabhai Haridas, JJ. The 20th December, 1875, Babaji Hari *vs.* Rajaram Ballal.

Decree of Bombay Small Cause Court—Power to proceed against immoveable property.

Although the Court of Small Causes at Bombay has power to enforce its decree against moveable property only, yet if that decree be transmitted to a Court to which the Code of Civil Procedure applies, the latter can, under Section 287 of that Code, enforce it against immoveable property also.

Vide 1, Indian Law Reports, Bombay Series, p. 82. (West and Nanabhai Haridas, JJ.) The 19th January, 1876—*In Re* Jag-jivan Nanabhai.

Res judicata—Section 2 of Act VIII. of 1859—*First suit against defendants as principals—Second as agents.*

A previous suit in which the plaintiff elected to sue the defendants as principals bars a second suit on the same contract in which the same defendants are charged as responsible agents under a trade usage.

Vide 1, Indian Law Reports, Bombay Series, p 87. (West and Nanabhai Haridas, JJ.) The 24th January, 1876.—Devrav Krishna *vs.* Halambhai.

HIGH COURT, N. W. P.

Execution of Decree—Limitation—Act IX. of 1871, *s.* 15.

Held, (Stuart, C. J., dissenting) that applications for execution of decrees are not "suits" within the meaning of s. 15, Act IX. of 1871. (*Vide* 24, W. R., p. 405, Baneekanto Ghose;—contra 24, W. R., p. 303, Rajah Promotho Nath Roy.)

Vide 1, Indian Law Reports, Allahabad Series, p. 97. (Full Bench.) The 5th August, 1875.—Jewan Singh *vs.* Sarnam Singh.

Stat. 24 *and* 25 *Vic., c.* 104, *s.* 15—*Powers of Superintendence of High Court—Revision of Judicial Proceedings—Jurisdiction.*

The High Court is not competent, in the exercise of the powers of superintendence over the Courts subordinate to it conferred on it by s. 15 of 24 and 25 Vic., c. 104, to interfere with the order of a Court subordinate to it on the ground that such order has proceeded on an error of law or an error of fact.

Where, therefore, on appeal by the judgment-debtor aganist an order confirming a sale of immoveable property in the execution of a decree, the lower Court set aside the sale, on a ground not provided by law, and the auction-purchasers applied under the above-mentioned section to the High Court to cancel the lower Court's order, the High Court refused to interfere. (*Vide* 2, B. L. R., A. C., 165; 23, W. R., 402.)

Vide 1, Indian Law Reports, Allahabad Series, p. 101. (Full Bench.) The 10th August, 1875—Tej Ram *vs.* Harsuk.

Hindu Law—Undivided Hindu Family—Inheritance.

When, in an undivided Hindu family living under the Mitakshara law, a brother dies without leaving issue, but leaving brothers, and nephews, the sons of a predeceased brother, the interest in the joint estate of the brother so dying does not pass on his death to his surviving brothers, but

on partition of the whole estate, including the interest of the brother so dying, is divisible; and the right of representation secures to the sons or grandsons of a deceased brother the share which their father or grandfather would have taken, had he survived the period of distribution.

Madho Singh, *vs.* Bindessery Roy, (H. C. R., N. W. P., 1868, p. 101) over-ruled.

Vide 1, Indian Law Reports, Allahabad Series, p. 105. (Full Bench.) The 27th August, 1875—Debi Persaud *vs.* Thakur Dial.

Redemption of Mortgage—Limitation—Acknowledgment of Title of Mortgagor or of his right to Redeem—Act IX. of 1871, *Sch. II., Art.* 148.

Where the defendants attested as correct the record-of-rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagor, *held* (Spankie, J., dissenting) that there was an acknowledgment of the mortgagor's right to redeem within the meaning of article 148, sch. ii. Act IX. of 1871.

Per PEARSON, J.—That there was also an acknowledgment of the mortgagor's title.

Vide 1, Indian Law Reports, Allahabad Series, p. 117. (Full Bench.) The 27th August, 1875.—Dala Chand *vs.* Sarfraz.

Principal and Surety—Clerk of the Small Cause Court—Bond for Performance of Duties of Office—Liability of Surety—Act XI. of 1865, *ss.* 45, 51—*Small Cause Court Judge—Principal Sudder Ameen (Subordinate Judge)—Jurisdiction.*

Held that, in permanently investing, under s. 51, Act XI. of 1865, the Judges of the Courts of Small Causes at Agra, Allahabad and Benares, with the powers of a Principal Sudder Ameen (Subordinate Judge), the local Government did not exceed its power or contravene the law, although the occasional investiture of Small Cause Court Judges by name from time to time, with the powers of a Principal Sudder Ameen, may have been the mode of procedure contemplated by the legislature as the one likely to be ordinarily adopted (Mussaumut Bijee Kooer *vs.* Rai Damodar Doss (H. C. R., N. W. P., 1873, p. 55, impugned).

The defendant and J. W. C., Clerk of the Small Cause Court at Allahabad, entered into a bond to the Judge of the Small Cause Court, as well as to his successors in office, in a certain sum as security for the true and faithful performance by J. W. C. of his duties as Clerk of the said Court, and for his well and truly accounting for all moneys entrusted to his keeping as such Clerk of the Court. *Held,* in a suit against the defendant as surety, that he was liable for misappropriation by J. W. C. of moneys arising from sales of moveable property held in execution of decrees passed by the Judge of the Small Cause Court in the exercise of his powers as Subordinate Judge, and that, had the Small Cause Court Judge not been invested, at the time of the execution of the bond, with the powers of a Subordinate Judge, the defendant's liability in respect of such moneys would not have been thereby affected.

Vide 1, Indian Law Reports, Allahabad Series, p. 87. (Turner, Offg. C. J., and Pearson and Oldfield, J.) The 31st August, 1875—Crosthwaite *vs.* Hamilton.

PRIVY COUNCIL.

The 17th December, 1875.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, and Sir M. E. Smith.

On Appeal from Calcutta High Court.

JUNESWAR DASS* (for Self and as Guardian of CHUNDER COOMAR) Defendant, (*Appellant*)

versus

MAHABEER SINGH, RAM ADHEEN SINGH and others, Plaintiffs, (*Respondents.*)

Limitation—Mortgage Bond—Act XIV. of 1859, *sect.* 1, *cl.* 12.

In a duly registered mortgage bond dated the 21st of June, 1856, the obligor covenanted to repay principal moneys and interest in Jeyt 1274 F. S., and mortgaged certain specified lands as security. The lands so pledged were subsequently sold to the Appellant in execution of a decree obtained upon another bond made by the obligor, subsequent and subject to the former.

In a suit brought on the 30th August, 1871, against the obligor and the Appellant to recover the amount due on the first bond from the former personally, and also by sale of the mortgaged lands, it was contended that the suit was barred under cl. 16, sect. 1 of Act XIV. of 1859 :—

Held, that the suit, being for the recovery of immoveable property, or of an interest in immoveable property, and founded not upon the contract to pay the money but upon the hypothecation of the land, fell within cl. 12, sect. 1 of the said Act, and was not barred.

SIR MONTAGUE E. SMITH :—This was an action on a security common in *Bengal,* called a mortgage bond, which appears to combine in one instrument two things, a personal obligation by the maker of the bond to pay the money, and a mortgage of property by way of pledge and security. The bond in question is dated the 21st of June, 1856, and was given by *Baboo Ritbhunjun Singh,* who is the Defendant No. 1 in the suit, to *Mussumat Agur Koonwar.* The consideration for the bond consists of the amounts which are stated to have been due under five previous bonds given to the Mussumat by *Baboo Dyal Singh* the father of *Ritbhunjun Singh.* The bond recites the former bonds, and proceeds thus :—" Hence, I, the declarant, do of my own accord and consent make myself responsible for the sums of money covered by each of the five above-named bonds, principal with interest, as well as other loans, &c., in all for Company's rupees 16,511, and bind myself for the payment of the said sum of money to the above said lady." This part of the bond contains a per-

* *Vide* 3, Law Reports, Indian Appeals, 1.

sonal obligation on the part of the maker of the bond, the Defendant No. 1, to pay the money. Then are inserted the terms of the loan: "With the consent of both parties it has been agreed upon that the interest should be paid as per detail given below, that is, the principal with interest I will pay at the rate of eight annas per cent. from the date of the execution of this bond to the end of Jeyt 1269 F. S., and from 1270 F. S. to Jeyt 1274 F. S. at the rate of Rs. 1 per cent. per mensem. Accordingly, I hereby declare and give in writing that I will positively, without any objection whatever, liquidate the said sum of money, principal with interest, in the month of Jeyt 1274 F. S., to the aforesaid lady." As far, therefore, as we have hitherto gone in the bond, the ultimate period for payment would not accrue until Jeyt 1274. Now comes the part of the instrument which creates an hypothecation of land: "For the satisfaction of the lady, and as security for the above sums of money, I pledge and mortgage mouzahs *Dhunpookhra* and *Bahooara* original, with dependencies appertaining to talooka *Athur*, pergunnah *Bhojepore*, held and possessed by me. I and my heirs shall not, as long as the whole amount aforesaid remains unpaid, transfer them in any way." Then there is a clause to this effect: "Should the mouzahs mortgaged be sold in execution of decree or for arrears of revenue, the said lady shall in that case be at liberty, without waiting for the expiration of the term of payment, to institute a regular suit, and to sell the moveable and immoveable properties of me the declarant and my heirs, and thereby realise the amount in question." This bond was registered on the 23rd of June, 1856.

The action is brought by *Bhedi Singh* and twelve other persons, who are the heirs of the Mussumat, the fourteenth Plaintiff being a person called *Turmundul Dass*, who had purchased a fourth share in the bond. The Defendants in the suit are, first, *Ritbhunjun Singh*, described in the heading of the suit as "the principal contractor of the loan," and, secondly, certain persons who are described in the same heading as "auction purchasers of the pledged property," and it may here be stated that they became such purchasers under a decree obtained upon another mortgage bond made by *Ritbhunjun Singh* subsequently to the bond in question, and of course subject to it. The date of the auction sale which is sought to be impeached is the 18th of May, 1865.

After the discussion which has taken place at the Bar, there remain only two questions to be decided. The first is purely a question of fact which was raised in the following issue, the third issue,—"Whether or

not the mortgagor has received the consideration money?" It has been contended by Mr. *Arathoon* that the consideration stated in the bond is not truly stated. The principal amounts of the five bonds enumerated in the bond in question are not disputed, but it is said that an amount of interest equal to the aggregate amount of the principal sums,—the principal being Rs. 8,000, and the interest Rs. 8,000 also,—found its way into the bond by some fraud or error, and that in point of fact that interest was not due, but had been previously paid. Both Courts below went very fully into the evidence given on that issue, and came to the concurrent finding that the Defendant has failed to establish it. Having executed this bond the onus is upon him to shew that the consideration had not passed. Both Courts have come to the conclusion that he has failed to support that burden, and that he has shewn no sufficient ground for the conclusion that that interest was not due. It is said that calculating only simple interest on the bond, the Rs. 8,000 could not be made up; but the High Court make a suggestion, which their Lordships regard as a reasonable supposition, that the parties before entering into the new bond may have come to an arrangement that rests should be made in the account, and compound interest paid. In the absence of satisfactory proof of fraud or mistake, every presumption in favour of the statements contained in the bond ought to be made, considering that it was deliberately entered into, and that for many years it has been acted upon, and payments made under it. Their Lordships, therefore, see no reason to be dissatisfied with the conclusion to which the Courts below have come upon the issue of fact, and the appeal so far as that issue is concerned fails.

The other question arises upon the period of limitation which is applicable to this case. As already observed, the instrument contains two distinct things: the obligation to pay the money, which binds the maker of it only, and the mortgage of the land; and the plaint in the present suit is properly framed upon the instrument in that aspect. It seeks to charge the first Defendant, the maker of the bond, *Ritbhunjun Singh*, personally, and it also claims to recover the amount of the principal and interest by the sale of the mouzahs (naming them), which were the hypothecated property included in the mortgage. It is contended for the Appellant that the limitation contained in clause 16, section 1, of the Act XIV. of 1859, is the proper limitation to apply to the case. That is a sweeping clause, which provides thus: "to all suits for which no other limitation is hereby expressly provided, a period of

six years from the time the cause of action arose." It is said that this is a suit brought to recover money lent, and the interest on that money, and that it falls within clause 16, because, although clause 10 applies to suits for money lent, it does not apply to them in the cases where the instrument shall have been registered within six months from the date, and this bond, having been so registered, is not within that section, and, not being otherwise provided for, falls within the limitation of six years in clause 16. Their Lordships, however, are clearly of opinion that neither of these clauses is applicable to this suit, which is brought, in substance, for the recovery of immoveable property, or of an interest in immoveable property, and falls therefore within clause 12 of the first section. The object of the suit is to obtain a sale of the land as against the Defendants grouped as Defendants No. 2 and No. 3, who had become purchasers under a subsequent mortgage bond. It is therefore, as against them, a claim founded not upon the contract to pay the money, but upon the hypothecation of the land. Their Lordships would have been disposed so to apply the *Statute of Limitations* if the matter had been *res integra*, but it appears from the cases to which they have been referred by Mr. *Cave* that there has been a long and almost uniform current of decisions in the two provinces of *Bengal* and *Madras*, giving this construction to the Act. Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. *Arathoon* that this suit would have been barred if the limitation of six years under clause 16 had been applicable to it. They think, upon the construction of this bond, there would be good reason for holding that the cause of action arose within six years before the commencement of the suit. However, it is sufficient to say that their Lordships think the limitation applicable to the case is that under clause 12, section 1, of the *Limitation Act.*

In the result, their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal with costs.

CALCUTTA HIGH COURT.

The 10th August, 1875.

PRESENT :

The Hon'ble L. S. Jackson and the Hon'ble W. F. McDonell, *Judges.*

HAMIDOODEEN AHMED, *Petitioner.*

Code of Criminal Procedure Act X. of 1872, *s.* 505.—*Probabilities—Pleader.*

A pleader purchased a piece of land adjacent to the Court in which he practises and which was occupied by tenants-at-will. He gave notice to the tenants to quit and he also gave a sum of money to a tenant to remove her hut. This was accepted by her but she did not remove. Then she was served with a notice to pay a daily rent at a very high rate. After this it appeared that by some means or other a fire broke out one night in the fallen thatch of a hut close to her and in consequence her house as well as those of others upon the land were burnt down. Next day the pleader went to the spot and told the tenants not to erect new huts. Then upon report made by the Police, the Magistrate took proceedings under section 505 of the Criminal Procedure against the pleader and ordered him to enter into his recognizances in Rs. 1,000 and two sureties in Rs. 500 each, to be of good behaviour for the space of one year. This order was followed up by a recommendation transmitted through the Judge, that the pleader should be struck off the rolls. The High Court condemned the proceedings of the Magistrate as most irregular and unfounded, and considering the evidence and adverting to the probabilities in the case found that the pleader was a man of excellent character, of station, means, education and every thing that is in fact the direct contrary to the sort of person against whom s. 505 is to be applied, that there was no sort of ground for striking him off the rolls and that these proceedings have not left the slightest stain upon his character. The High Court was also strongly of opinion that it should not be satisfied with merely annulling the orders of the Magistrate but that it should also submit the case for the consideration of the Lieutenant-Governor.

JACKSON, J.—The proceedings in the case of the petitioner Hamidoodeen Ahmed are of an extraordinary character. It is admitted that the petitioner acquired lawfully and duly from one Tameez the rights which Tameez had as tenant over a piece of land in the neighbourhood of the public offices at the sudder station of Mymensing; and that upon a portion of that land stood some huts occupied by one Monee, who is a common prostitute, by other women of the same profession and by some other persons. The petitioner seems to have taken this land for the purpose of turning out these occupants, who were only tenants-at-will, and using it for some purposes connected with the business of practitioners in the Courts; and in furtherance of that intention he gave notice to this Monee and the other occupants to quit. He further gave Monee a sum of Rupees 5 to enable her to remove her house. This money she accepted but did not remove, and she was afterwards served

with notice to pay a daily rent at a very high rate. After this it appears that by some means or other a fire broke out one night in the fallen thatch of a hut close to her, although not immediately contiguous, and that in consequence the house of Monee and other houses upon that piece of ground were burnt down.

Monee was summoned to the police station and questioned in regard to the fire, for the Police appears to have suspected that it was the work of an incendiary. She thereupon said that the petitioner, Hamidoodeen, had put up part of the frame-work of a house close to her, and that he had made various attempts to induce her to remove, and that she believed he had instigated some one to set fire to her house in order to frighten her into going away. Similar suspicions having been expressed by the other women, the Sub-Inspector of Police made a report of the facts and stated his own opinion as coinciding with the suspicions of the females, to his superior, the District Superintendent, who upon that report endorsed the following order: "To Magistrate for orders: The fire of the 16th instant looks very much like the act of an incendiary. I do not think that under the circumstances, Hamid Ali, Vakeel, ought to be allowed to occupy the lands to the detriment of those who occupied the lands previous to the fire—H. W. Reily, District Superintendent." So that although there was manifestly no case which the District Superintendent felt himself in a position to investigate, he gratuitously recommended to the Magistrate that the petitioner should be debarred from the exercise of his private rights in regard to the land which he lawfully held. On receipt of that report the Magistrate appears to have summoned the woman Monee, and he took down her statements which amongst other things contained the following words: "Hamidoodeen Moonshee, a pleader, had the bamboo posts of a house commenced to be built some months since on the east of the road, on the south of the house where the fire broke out, and on the west of mine, which was close to it. Hamid has not built this house because we remain there. Tameez, our landlord, has let him the *bheeta* on which he has put these bamboo posts, but Tameez supports us. Hamid has been for some time wanting us to go away, so that he can have the ground on which our houses stand; two months since he first told me to go. A month ago he gave me Rs. 5 to remove my house and threatened to drive me off if I did not go. I had nowhere to go and was afraid to give the Rs. 5 back. Then his servant brought me a written notice to pay Rs. 3 per day rent. The day after the fire he came and told us we

must not put up these houses any more. On account of this we suspect him being the cause of the fire, and are afraid to put up our houses again. In facts two attempts have already been made to burn my house which is nearest his *bheeta*. Three months ago Bhyrub called to me in the early dawn and I found my thatch was on fire. I pulled out the thatch and in it was a partly consumed *tikya* (charcoal fuel) in some jute. The other attempt was made longer ago." It appears in fact, from the evidence of another witness, that the attempt was made two years ago, *i. e.*, considerably before Hamidoodeen purchased or had any interest in the property at all. Upon these statements the Magistrate makes the following order: " Hamidoodeen Moonshee would appear from the above statements to be a dangerous character. Warrant is issued against him under Section 505 of the Criminal Procedure Code for appearance to-morrow: summons on Tameez, Bhyrub, Manoollah Fakeer, witnesses. The women present to attend again." Upon this, Hamidoodeen, before the warrant had issued, seems to have voluntarily appeared before the Magistrate and was examined. His examination was in these words, the charge being that of being a dangerous character. He was asked have you hired, and when, a plot of ground on the north-east of the Government road on the north of this kutcherry house. His answer was—Yes, on the 16th Augran I received a pottah of three cottahs from one Tameez. There were some prostitutes and others living in hired houses on this ground.

Question.—Did you commence to build a house, and if so why did you discontinue.

Answer.—Yes, and left off for want of laborers.

Question.—What steps did you take to get the prostitutes off the ground.

Answer.—I told them to go again and again—two of the women agreed and then asked to be allowed to stop. One would not. So I served her with a notice to pay Rs. 3 daily rent, then she agreed to go and I gave her Rs. 5 to take herself off, then she did not go, so I told her as she asked to remain a little longer to suit her convenience.

Question.—You did not hear that there were three attempts to burn Monee Noti's houses, the last of which succeeded?

Answer.—No. I only heard of the last one.

Question.—Did you go to the place after all these people had been burnt out?

Answer.—Yes, and I found the day after that they had put up tatties to shelter them so I told Karbali they might clear out of the ground and not put up the houses there any more.

Question.—Did you know that there was an empty house lying on the north of your frame-work the last ten days or so that the fire began there?

Answer.—Yes—but I doubt if the fire began there I expect Monee Noti burnt it herself. The houses were my property and bought with the land.

Question.—Do you desire to call any evidence to remove the suspicion that lies against your character of having caused this fire?

Answer.—Yes. Tameez from whom I rent the land, Lokenath Mozoomdar, Manoollah Fakir and others.

Monee Noti was further examined and Tameez was also examined. He says this: "I have permanent ryottee holding of the land on which the houses of Monee Noti, Manoollah Fakir and others were burnt down. I have hitherto received rent from them. Eight months since I gave a lease of the land with the houses on it to defendants. Some of the houses are my property; some the property of the occupants themselves, Monee's house was mine. She had no option of removing the house she lived in. All the others are mine. Monee Noti's house was her own; and she could remove it when she pleased. So also Afzan's, her own, and Karbali's. I should estimate the value of the houses that were mine, and therefore defandants, three in all, at Rs. 100 and so on. So that in fact it is clear that the house of Monee stood upon ground to which the defendant was entitled, that she had been repeatedly warned to quit the land having had no right to it and that the defendant petitioner had given her assistance which she had accepted for the purpose of removing her huts from the land. The only further proceedings that are worth mentioning are that the petitoner called and caused to be examined by the Magistrate witnesses of the very highest respectability including the Deputy Magistrate, Syud Mahomed Israil, who is a gentleman of honorable family, as well as Government officer of rank, the Head Clerk of the Collector's office, Baboo Kaly Churn Bose, and named several other persons of equal position and credit and proved most clearly that he was a person of the best character, of excellent position, of professional status and also of a liberal education. With these facts before him the Magistrate records a judgment in which, after setting out the facts, he says: "Having regard to his interest in

the matter and the action of defendant I have to consider whether the suspicions of his being the prime mover in this offence of mischief by fire are grave, and if they are, whether the suspicions in the past and the apprehensions for the future, constitute him an apparently dangerous character from whom security under Section 505, Criminal Procedure Code, should be demanded. As to the legal application of Section 505 of the Criminal Procedure Code, the words run: "When it appears to the Magistrate, from the evidence as to general character adduced before him that any person is a dangerous character, such Magistrate may require security, &c." There will be no question that a person who commits the offence of mischief by fire is a dangerous character. The question is, what is the evidence of general character in such cases as to a person being a dangerous character on which the Magistrate is justified in acting. It seems to me that in such a case as this the only evidence of general character which can be taken is that bearing on, *i. e.*, bringing suspicion or apprehension of the acts which constitute the man to be a dangerous character. The defendant urges that the loss was his, and then he goes into that question, and afterwards says: "the defendant produces evidence of good character, but nothing to remove the suspicion in this set of facts and apprehended acts. The crime of mischief by fire is of lamentably frequent occurrence and is committed without a chance of detection. It is therefore the more necessary when suspicions are strong to take such measures as may be against a repetition of the crime. As defendant Hamidoodeen Ahmed appears to me to be of dangerous character, I order that he enter into his recognizances in Rs. 1,000 and two sureties in Rs. 500 each, to be of good behaviour for the space of one year." This order has been followed up by a recommendation transmitted through the Judge, that the petitioner should be struck off the rolls as a pleader. It appears to me that a more unfounded and irregular proceeding against a person in the petitioner's position could not be conceived. The circumstances which preceded this fire—and it is after all quite an open question whether the fire was the act of an incendiary at all—were such as, if supported by other facts favouring the imputation, might raise a *primâ facie* case; but those circumstances were in truth so completely displaced by the other facts of the case that it appears to me that the issuing of a warrant against the petitioner under such circumstances amounted in my opinion to a cruel wrong. This gentleman was a pleader, and a person of station; his adversary was a person of the meanest condition. He had the law

in his side, the Courts within his reach; what possible inducement could he have had to expose himself to the risk of a criminal prosecution by connecting himself with such an act as this? While he must have known that if he were supposed to be in any way accessory to the fire, suspicion would immediately, as it did, alight upon him. With knowledge of the behaviour of the natives of this country placed in such circumstances, one may say with tolerable certainty that if this gentleman had been imprudent as well as wicked enough to commit such a crime as this he would certainly have absented himself from the place instead of which we find him the day after the fire repairing to the scene and openly telling the occupants of the houses.—" Now that your houses have been burnt down, you must not erect new houses again, but as I gave you notice take yourself off from this place. They did not attempt them to impute to him the commisson of the crime. Then, as to the application of Section 505, it appears to me that the proceedings of the Magistrate in this case are a simple perversion of that section. Section 505 enables the Magistrate, wherever it appears to him, from the evidence as to general character adduced before him, that any person is by repute a robber, housebreaker, or thief, or a receiver of stolen property, knowing the same to have been stolen, or of notoriously bad livelihood, or is a dangerous character, such Magistrate may require security for good behaviour. Now, as to the evidence of general character in this case, it is manifest that it was absolutely and entirely overwhelming in favour of the petitioner, and shows him to be a person of excellent character, of station, means, education and everything that is in fact the direct contrary to the sort of person against whom Section 505 has been directed. In such circumstance as that, to apply the provisions of that section to a man against whom a weak unsupported gossiping charge of mischief by fire has been preferred, appears to be an application of the provisions of the Code of Criminal Procedure as far removed from the intentions of the Legislature as it is possible to conceive. It appears to me that the orders of the Magistrate in this case were not only illegal but oppressive; and I am so strongly of that opinion that I think we ought not to be satisfied with merely annulling his orders, but that we must also submit the case for the consideration of the Lieutenant-Governor.

It is needless perhaps to say that there is no sort of ground for dismissing the petitioner from his office as pleader, and that these proceedings have left not the slightest stain upon his character.

CALCUTTA HIGH COURT.

The 15*th June*, 1866.

The Hon'ble Sir Barness Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*

In re SHEIKH AHMEENOODEEN AHMED,* *Petitioner*.

Pleader—Dismissal.

It is very improper to suspend a pleader for misconduct, and then to leave the matter undecided, whether he is to be dismissed, or the suspension is to be removed for any long period.

Judges ought to reflect upon before they dismiss a pleader on the basis of a charge of misconduct of which he has already been acquitted by a competent Criminal Court.

Pleaders and witnesses who are not parties to a suit, cannot call witnesses on their own behalf to disprove any charge which may be made against them. If a Judge states his reason for disbelieving a witness, whether the Judge be a Judge of the High Court or not, his remarks are not sufficient to justify the conviction and punishment of the witness. Statements made behind a person's back, and which he has no means of answering, are surely not to be used as evidence on which to convict him of a crime, or to dismiss him from practising his profession.

Pleaders are admitted to that honorable profession on proof of their capacity and of their good moral character. Unless it is shown that they are possessed of the requisite capacity and good moral character they cannot be admitted. But when once admitted, unless on proof of specified misconduct, they cannot be removed from that profession.

PEACOCK, C. J.—On the 22nd January last, Mr. Birch, who was the Judge of Shahabad, dismissed the petitioner, Sheikh Ahmeenoodeen Ahmed from his office as a pleader of that district. The order was passed after Act XX. of 1865 come into operation. That Act came into operation on the 1st January, 1866, and by the 3rd Section of the Act it is enacted that, "so far as they affect the territories to which the Act extends, the enactments set forth in the first schedule hereto are repealed, except so far as they repeal any other enactment, and except as to the recovery and application of any penalty for any offence which shall have been committed before the commencement of this Act."

One of the Acts mentioned in the schedule as repealed was Act XVIII. of 1852, called the Pleaders' Act, and it is clear, I think, that the dismissal of a pleader under that Act cannot be considered as the recovery and application of a penalty as provided for in Section 3.

* *Vide* 2, Wym. Rep. (Civil Rulings) p. 66.

Therefore the Judge, when he passed that order, had no power to make it. He ought to have proceeded under the provisions of Section 16, and to have referred the matter, with his report, to the High Court, if he thought that there was ground for dismissing the petitioner.

On the 6th April last, this Court made an order to the effect that the order of the Judge dismissing the petitioner will be quashed, unless the Judge, within one fortnight after the receipt of the order of this Court, shall show cause to the contrary.

On the 14th April, 1866, the Judge sent a letter commencing:—

"I have been called on by the High Court to show cause why my decision of the 22nd January last should not be reversed. My order has been quashed without any reference to the records upon which it was based.

"As this mode of procedure is novel to me, and I do not know what I am required to do, and as I consider that my order is perfectly justified by the records of the cases I now submit, I have only to ask that the Judges will be pleased to go through these cases. I have made my notes on the pleader's petition, which is full of misrepresentations. More than this I do not consider myself bound to do."

But then the Judge thinks it right to remonstrate against the order of the Court. He says:—

"I beg respectfully to remonstrate against the procedure adopted in this case. My order has been reserved without the Appellate Court looking at the records on which I had founded my opinion. The pleader has returned, giving out that he is to be allowed to practise at once, I submit that the Judges of the Appellate Court should assume that a Judge has come to a right decision until they are in a position to show from the records upon which the Judge has based his decision, that he is not justified in coming to the conclusion he has arrived at."

Now this Court did not set aside the order without hearing the Judge. They made their order in the form in which they framed it, rather out of consideration to him; they did not call upon the Judge to show cause why his order should not be reversed, and they did not reversed his order without giving him an opportunity of supporting it if he wished. They merely say that the order will be quashed if he does not show cause to the contrary. If Mr. Birch had been called upon to show cause (he being a Judge of a subordinate Court), it might have looked as if the Court had decided that he had acted improperly, and called upon him for an explanation.

With regard to the Judge's remonstrance, the Court did not assume the Judge had come to a wrong decision without having looked into the case. His own order upon the face of it showed that he was *primâ facie* wrong, and therefore the Court said, in substance, that they would quash it, unless he could show that it was right.

Now, the proceeding against the petitioner commenced as far back as the 22nd July, 1863. He was then called upon to show cause why he should not be dismissed, and he was actually suspended from appearing in the Judge's Court.

The Judge, in his order dismissing the petitioner, says:—"Sheikh Ahmeenoodeen, pleader of the Judge's Court, was *quasi* suspended by my predecessor, in consequence of a number of charges preferred against him of dishonest conduct in the discharges of his professional duty. He was called upon by my predecessor to answer to the charges, and his answers were filed. The case was not, however, taken up by my predecessor, but, though ripe for decision, was left to me to dispose of."

I do not know what the Judge meant by "*quasi* suspended." Probably he meant that the petitioner was not suspended altogether, but only so far as appearing in the Judge's Court. Be that, however, as it may, the pleader was actually suspended, and he had the imputation of dishonesty cast upon him as far back as the 22nd July, 1863, nearly two and a half years ago, and the matter was not finally disposed of, one way or the other, until the 22nd January in the present year. I must say that it appears to me a very improper thing to suspend a pleader for misconduct, and then to leave the matter undecided, whether he is to be dismissed, or the suspension is to be removed for any long period. That, probably, was not Mr. Birch's fault, but the fault of his predecessor, in not taking up the case and deciding it as soon as it was ripe for hearing.

The Judge says:—

"The first charge is that the pleader, in the case of Sokhee Roy, fraudulently applied for a sum of money which his client had realized before the mutiny. The pleader filed an answer, denying that his client had ever received the money. It was proved that he had, and the Principal Sudder Ameen sent the pleader to the Magistrate. The case came before the Joint Magistrate, who, crediting the pleader's statement that he did not know the money had been paid, let him off. The present petitioner urges that conduct such as this should be noticed, although the pleader has been let off by the Criminal Court."

With reference to this charge, the petitioner says :—

"That the first charge is wholly answered by the fact that your petitioner was acquitted by the Magistrate, nor is there any proof that your petitioner applied for that money with a knowledge that his client had previously realized the same. Your petitioner, as a vakeel, received instructions in regard to that matter, and acted on the instructions he had received; and thus your petitioner submits that no intentional misrepresentation has been made out, nor could be."

Upon this the Judge remarks :—

"Reference has only to be made to the formal decision of the Principal Sudder Ameen, dated 3rd October, 1861, to show the falsity of this statement."

The Principal Sudder Ameen at that time did not decide that the pleader had been guilty of misconduct. He only found that a *primâ facie* case existed against him, upon which he sent the pleader before the Magistrate upon a criminal charge. The mere order of reference to the Magistrate in a case in which the pleader merely acted as a pleader, and was not even a party, cannot be taken as conclusive evidence against the petitioner to justify his dismissal for an offence for which he had been tried and acquitted by the Magistrate. But the case did not stop there. On the 22nd December, 1862, Mr. DaCosta, the Principal Sudder Ameen, passed an order on a petition against the petitioner. Mr. DaCosta went into the case, and found that the pleader had been acquitted by the Magistrate, and he dismissed the petition, and made the petitioner pay costs. How then can anything said by the Principal Sudder Ameen before the case was heard and finally determined by the Magistrate and Mr. DaCosta in favor of the pleader, be taken as evidence of his guilt?

The pleader, then, has been acquitted by the Magistrate, and acquitted by Mr. DaCosta in 1862; and yet, more than three years afterwards, he is convicted by Mr. Birch of an alleged previous offence, merely upon the statement made by the First Principal Sudder Ameen when he sent him before the Magistrate. But Mr. Birch in this letter says :—

"This acquittal of the criminal charge by an inexperienced young officer does not remove the stigma attached to his name by the formal record of his dishonest conduct as a pleader by the Principal Sudder Ameen, and the Judge at the time should have dismissed him, upon the Principal Sudder Ameen's decision."

I think that Judges, before they act in this way, ought to reflect upon what they are about. The petitioner had obtained his sunnud twenty years ago, and he ought not to be dismissed unless a case were proved against him. It is ruin to a man to be dismissed from the office of pleader, and deprived of the right of carrying on a profession in which he has been engaged, and been supporting himself and his family for a period of twenty years. But he is not only dismissed, but dismissed with a ruined character. Is a man to be ruined in his character and in his prospects in life upon the charge of having committed an offence of which he has been acquitted, merely because a Principal Sudder Ameen, three or four years ago, made some remarks against him, and charged him with an offence of which he was acquitted by the tribunal which had jurisdiction to try him? Or is he to be dismissed in 1863 for the very same charge for which the Principal Sudder Ameen had dismissed, with costs, a petition against him in 1862? If such a proceeding as this is to be upheld, no man would be safe?

The second charge is that, "being the vakeel of Chowdry Sheo Sahai Singh, who sued for possession in virtue of a mortgage deed, he purchasd the land, the subject of the suit, in another execution of decree case, and threw up his appointment of vakeel to Sheo Sahai Singh, thereby acting dishonestly by his client. Having purchased the land under mortgage to the detriment of his client, he is accused of dishonest and unprofessional conduct."

In reference to this charge, the Judge, in his order of dismissal, remarked as follows :—

"I consider that the pleader's conduct in purchasing in execution in another case a property under litigation, of which litigation he had the management, is of itself a breach of trust sufficient to render him deserving of dismissal. His subsequent reconciliation with his client in no way affects the dishonesty of his conduct."

The pleader, in his answer to this second charge, says that there is no one of the elements for which a dismissal is provided by Act XVIII. of 1852. The purchase of the property in auction jointly with others, which property was alleged to be pledged under a bond upon which a suit had been instituted, is, your petitioner submits, not fraudulent conduct. Your petitioner, upon the purchase, withdrew from the case with notice to his client, who made no objection. If the bond were true, the purchase by your petitioner jointly with others of the rights of the ori-

ginal proprietor would in no way prejudice the plaintiff in that suit. The Judge is wrong, both in law and in fact, in saying that your petitioner's conduct was to the detriment of his client, and that he is accused of dishonest and unprofessional conduct, whereas there is no charge preferred against him by any person."

Now, it is well known that a purchaser at a sale in execution purchases only the rights of the judgment-debtor, and that if he purchases an estate under mortgage, he does not take it free from the mortgage. When the property in question was put up for sale, the petitioner joined other persons in purchasing it. Of course his interest as a purchaser would be in conflict with his duty as a pleader for the mortgagee, who was endeavouring to establish his mortgage. As a pleader, it would be his duty to endeavour to establish the mortgage; as a purchaser, it would be his interest to get rid of the mortgage, so as to acquire the property free from the mortgage. It is unnecessary for the present purpose to determine whether the pleader having been retained by his client for the purpose of establishing the mortgage, could have abandoned his retainer and joined with others in purchasing the property. That is not the charge on which the Judge has dismissed him. He dismissed him for dishonest conduct. Remaking on the pleader's answer to the second charge, the Judge says:—"Reference to the formal decision of the Principal Sudder Ameen, 15th December, 1860, in which he comments with severity on the pleader's dishonesty, will show what an officer of his experience thought of this case, and the pleader ought to have been dismissed, then and there, under Section 2, Act XVIII. of 1852."

But when we look at the decision to which the Judge refers, we find that the Principal Sudder Ameen, having gone into the question as to whether the bond was a genuine document or not, said, "in my opinion, the bond is not a valid document; its very existence is founded on fraud and fiction." Now, the bond is found by this judgment to be a forged bond, and founded on fraud and fiction. The pleader having been retained to enforce the bond, joined others in purchasing the property. But the pleader did not do it secretly. He gave his clients information of his having joined others in purchasing the property as he alleged, and he threw up his retainer with the consent of his client, or at least after notice to the client, and without objection. If the pleader had concealed from his client the fact of his having purchased, or if he had purchased *benamee*, and continued to act for his client as if nothing

had occurred, and allowed his client to lose his case by having his mortgage set aside, there would have been dishonesty. But where was the dishonesty in throwing up the retainer and becoming the purchaser?

The Principal Sudder Ameen proceeds to remark:—"And it is not unlikely that the first party, defendants, too, had a hand in this fraud, because to be indifferent after what had transpired argues complicity in the fraud. It is certainly surprising for Sheikh Ahmeenooddeen Ahmed, pleader of this Court, to act in the manner he has done. Although he was plaintiff's pleader, still he purchased at an auction sale the same property *that was* pledged in the bond; afterwards disengaging himself from pleadership to plaintiffs, appears on the side of the defendant to set aside the bond, and again having entered into a razeenamah with the plaintiff, resumes his pleadership, and while engaged as his pleader, he gave his evidence deposing that he cannot say whether the instalment bond was genuine."

By allowing the pleader to resume his pleadership, it would seem that the client did not think that the pleader had committed an act of dishonesty. The Judge does not find that the pleader purchased without notice to his client, or that his client objected to his throwing up the retainer, nor is it anywhere found that the mortgage was concocted and set up fraudulently by the pleader and his client, in order that the pleader might become the purchaser at a low rate upon the supposition created, that the land sold was subject to the mortgage.

Section 2 of Act XVIII. of 1852 provides:—"Any pleader practising in the said Courts shall be liable to dismissal on proof of his conviction, by a competent Court, of a criminal offence, or on proof of a declaration or finding by a competent Court in a suit or proceeding to which such pleader was a party, that he has knowingly committed a breach of trust, or for fraudulent or dishonest conduct in the discharge of his professional duty."

Surely this was not a suit against the pleader for breach of trust. This was a suit to enforce a mortgage against the purchaser. If the pleader had kept the retainer, his duty as a pleader would have been adverse to his interest as a purchaser. The suit was brought to determine whether the mortgage ought to be enforced against the pleader as purchaser, and it was settled by compromise. The suit was not brought by the owner of the land for depreciating the sale by setting up a fictitious sale. The owner of the land made no complaint. How then can it be said that this was a suit instituted against the pleader in which a Court

of competent jurisdiction decided that he knowingly committed a breach of trust? What breach of trust? Surely not the throwing up of his retainer in a suit to enforce a forged bond? If there was a breach of trust, who was the trustee, and who was the person beneficially interested in the trust?

The third charge against the pleader is, that he filed a petition in the name of Mussamut Padmawat Kooer, which petition he was not authorized to file, and that he filed it with fraudulent intent.

In reference to this charge, the Judge says:—"My predecessor appears to have taken this case up, but to have let it drop on the representation of other pleaders of the Court, that they had to rely upon mookhtears who applied to them to file petitions."

In pronouncing the judgment of the Court in this case, dismissing the pleader, the Judge passed from the second to the fourth charge, thereby letting the third charge drop, as his predecessor had done.

In reference to this charge, the pleader says "that the third charge against your petitioner was one that had been investigated and dismissed; your petitioner should not again be harassed with it. Besides, the Judge is wrong in saying that the matter was dropped by former Judge on the representation of the pleaders. The party who had preferred that charge was called upon to support it by oath, but did not do so, and therefore the Judge dismissed the charge." In commenting on the pleader's answers, the Judge takes up the charge again which he had passed over in his judgment. He says, "the lady petitioned the Court that she had never authorized the pleader to file the petition he had filed on her behalf, and which was injurious to her interests. On this, Mr. Leycester called on the pleader to defend his conduct. (3rd March, 1862). Mr. Tucker then ordered the lady to appear in Court and give her deposition. She of course objected, being a lady of rank, and asked that a commission might issue. This was refused, and the case was struck off *because the lady would not come into Court.* Reference to Mr. Leycester's roobakaree will show what he thought of the pleader's conduct."

In answer to the same charge the pleader goes on further to say, "that your petitioner had put in his defence in that matter, and had completely refuted the charge preferred against him; and, further, there is no evidence whatever in this investigation that your petitioner acted with a guilty knowledge, or was a party to the fraud, if there was any, for the subsequent conduct of Mussamut *Padmawat* clearly shows that

she was playing "fast and loose," for she compromised the suit afterwards on the very terms of that petition."

The Judge says that the charge was allowed to drop because a commission was refused and the lady would not come into Court. I thought it very unlikely that Mr. Leycester would have refused to issue a commission, and have compelled a lady of rank to appear in Court. The Judge has not ascertained the facts with accuracy. A commission was not refused; the persons who appeared for the lady were asked if she would declare that she never signed the document. The persons who represented her stated that she was away from home, that she could not appear in Court, but that if a commission were issued they had no doubt she would prove that she had not signed. Three weeks were given to them; at the end of that time they did not appear. But what is very remarkable, the suit was afterwards compromised by the lady on the terms of the petition which the pleader was charged with having filed without her authority. The Judge does not deny that part of the statement of the pleader.

The next charge is the fourth charge, namely, "that the pleader having taken a vakalutnamah to file an objection to a sale, instead of filing it kept it back, let the sale proceed, and purchased the property sold in the name of his wives and defendants, and that in so doing, he was guilty of dishonest conduct in the discharge of his professional duty."

The pleader answers:—

"The fourth charge is wholly unfounded. Your petitioner never took any vakalutnamah to put in an objection to the sale. The very petition of 18th November, 1862, by which the complaint as to the irregularity of sale was made on behalf of the judgment-debtor, places the matter beyond a doubt, that your petitioner refused to receive the vakalutnamah. Those were enough, but your petitioner distinctly denied the fact that he was ever offered that vakalutnamah, and it has never been proved that that vakalutnamah was offered to your petitioner. Further, the person who is said to have acted as Mokhtar was not then a Mokhtar of the Judge's Court, and that is clear from that very petition. Besides, your petitioner was not a vakeel of the Sudder Ameen's Court. The object of that petition is quite clear from its contents, that it was only to create evidence of a purchase for the judgment-debtor himself, and was nothing but a vituperation, as is usual amongst natives.

"Your petitioner would also submit that there is not a tittle of evidence in support of such charge."

With reference to the pleader's answer, the Judge merely says, that "reference must be made to Mr. Solano's petition." Now it ought to be known that pleaders are not to be ruined in their character and prospects in life on a mere petition without proof. There was no evidence whatever in this case to prove the charge against the petitioner. No man would be safe if every statement made in a petition filed in the Mofussil Courts is assumed to be true without any evidence given in support of it. In this case Mr. Solano himself did not even verify his petition. This charge, therefore, like the others, falls to the ground.

The next is the fifth charge, which is "that the pleader fraudulently and dishonestly filed a petition on behalf of Mussamut Moula Bux which she had not authorized him to file." On this charge, the Judge, in his order of dismissal, says:—"As regards his conduct in the last mentioned case, it has been commented on with severity by the Judges of the High Court in the case of Moula Buksh *versus* Hossein Jan; the pleader is pronounced to be wanting in strict integrity, and the evidence given by him is pronounced to be utterly unreliable by one of the Judges."

But it should be borne in mind that the pleader was no party to that suit, and whatever remarks the Judges may have made in that case, as to whether he was worthy of credit or not, the mere remarks made in a suit, *inter alias*, against which the pleader had no means of defending himself. They were probably not even made in his presence. Pleaders and witnesses who are not parties to a suit cannot call witnesses on their own behalf to disprove any charge which may be made against them. If a Judge states his reason for disbelieving a witness, whether the Judge be a Judge of the High Court or not, his remarks are not sufficient to justify the conviction and punishment of the witness.

If a Judge says, I wholly disbelieve the witness, or if he go further, and says, I believe the witness has perjured himself, this is not sufficient to warrant the punishment of the witness for perjury without a trial. Is it no punishment, I would ask, for a man to be dismissed from a profession with degradation? Statements made behind a person's back, and which he has no means of answering, are surely not to be used as evidence on which to convict him of a crime, or to dismiss him with disgrace from practising his profession. There is only one course to be pur-

sued by Judges in dealing with pleaders guilty of misconduct. They should enter a charge and decide the case according to the evidence. Act XVIII. of 1852, under which the Judge appears to have been erroneously acting, says (Section 2) that a pleader shall be liable to dismissal on proof "of his conviction, by a competent Court, of a criminal offence," or on proof "of a declaration or finding by a competent Court in a suit or proceeding to which such pleader was a party" that he is guilty of a breach of trust.

There has been no proof of a conviction by a Criminal Court of a criminal offence, nor was the decision of the High Court, referred to by the Judge, a decision in a suit in which the pleader was a party. It was a proceeding *inter alias*, and could not be taken as evidence against the pleader, or be used as a ground for dismissing him without giving him an opportunity of defending himself.

The third ground mentioned in the Act to justify the dismissal of a pleader is "fraudulent or dishonest conduct in the discharge of his professional duty." But to justify such a dismissal, it is necessary for the Court to find either from the conduct of the pleader which they themselves witness in Court, or from evidence produced before them, that the pleader is guilty of fraudulent or dishonest conduct; and this also must be done after notice to the pleader, and allowing him to be heard. The observations, therefore, of the High Court in the case referred to did not warrant the Judge in dismissing the pleader.

The Judge goes on (and I must say that I could scarcely have believed that a Judge of Mr. Birch's judgment and experience could have fallen into such an error as he has done.)

"The pleader bears a bad character in the Courts of the Sudder station, and *were I to search for other evidence against him, I am informed that it would* be forthcoming. I consider it unnecessary to do so."

Could anything be more dangerous or unsatisfactory than for a Judge to allow his mind to be influenced by such considerations as these, or could anything be more improper than for one intrusted with a judicial office, on pronouncing a decision which must necessarily ruin a man's character and prospects in life, to declare and to register against him on the records of his Court that "if he were to search for other evidence, he is informed it would be forthcoming?"

It appears to me that the charges against the petitioner are not made out, and that until he is proved to have been guilty of dishonest conduct, he must be presumed to be innocent. A pleader is not to be

dismissed from the practice of his profession merely upon suspicion and and without proof. The Judge says in his letter—"if the Court is not satisfied with the expression of my opinion of the pleader's acts and character, I would suggest that Mr. Tucker and Moulvie Imdad Ali Khan, Small Cause Court Judges of Tirhoot, be called upon for their opinions. I am informed that it was Mr. Tucker's intention to dismiss the pleader."

But pleaders are not to be dismissed merely upon Judges' opinions, nor is one Judge to dismiss a man because he is informed that it was his predecessor's intention to do so. A pleader, like any other man, is entitled to be heard, and to defend himself, like any other person, against any charges against his character or conduct. He is entitled to an open trial, and not to be convicted without proof.

The Judge says further—"his restoration to office will have a bad effect and neutralize my efforts to purify the Courts." But if a pleader has been dismissed illegally he must be restored, and if the Courts are to be purified, they must be purified by lawful means.

Having heard all that the Judge has said in support of the order, I am of opinion that the order cannot be supported, and that it must be quashed.

MR. JUSTICE JACKSON.—I am of the same opinion. As the Judge has taken upon himself to act in this matter, and to dismiss the petitioner from his office of pleader, it must be assumed that he considered himself to be acting, not under the existing law, but under the law in force previous to 1st January last.

Under the repealed Act XVIII. of 1852, there were three causes for which a pleader might be dismissed. One was on account of his conviction by a competent Court of a criminal offence. The second was on account of its being declared or found by a competent Court, in a suit or proceeding to which the pleader was a party, that he has knowingly committed a breach of trust. The third was on account of fraudulent or dishonest conduct in the discharge of his professional duty. The 3rd Section of that Act points out the mode in which either of the two first mentioned causes is to be shown: the first to be shown by the production of an authenticated copy of the judgment containing such conviction; the second, in like manner, to be supported by an authenticated copy of the decision containing such declaration or finding, and in addition to that, the Court is to be satisfied in each case by proof that

such judgment or decision has not been set aside or reversed, and that the pleader is the party to whom such conviction or decision relates.

The third of these causes is to be established by proof to be taken and set up, in the presence of the accused party, before the Judge who enquires into the matter.

In this case there were five charges against the petitioner, and alluded to in the course of the proceedings. The first, it may be supposed, the Judge considered as coming under the first category, namely, criminal charge. But although the person was charged with a criminal offence and made over to the Magistrate, so far from being convicted, I find that he was acquitted, and that the judgment of the civil authority referring him to the Magistrate was afterwards virtually set aside by another Principal Sudder Ameen in the same district.

Then as to any finding in a suit or proceeding to which the pleader was a party that he had knowingly committed a breach of trust, certainly there is nothing of that kind. There are two cases here. The 2nd and 5th instances, the Judge seems to consider, may have come within that category. But certainly there were no suits or proceedings to which he was a party, or any decision of a Court of competent jurisdiction that the petitioner had committed a breach of trust, nor was there any compliance with the procedure prescribed by Section 4, by which he could have been properly convicted. Section 4 says :—

" When any pleader is charged with fraudulent or dishonest conduct in the discharge of his professional duty by any person or Court, the Court competent to make an order for his dismissal shall serve, or cause to be served, upon such a pleader a copy of the charge or charges brought against him, and also a notice of the day appointed by the said Court for the hearing of such charge or charges; and such copy and notice shall be served upon the said pleader at least twenty clear days before the day appointed for such hearing, and on the hearing of the said charge or charges, the Court shall receive all such relevant evidence as shall be properly tendered by or on behalf of the Court or party bringing the charge or charges, or by the said pleader, and shall proceed to adjudicate on the said charge or charges in a summary way, and shall record its decision and the reasons on which the same is grounded."

Can it be said that there was any such adjudication as this—that the party was called upon to answer any charges brought against him, that any evidence was tendered to, and received by, the Judge? He has done nothing of the kind. He has acted on opinions contained in a

mass of papers, upon charges made long before, some disproved, some dropped, and some not amounting to misconduct at all, such as to warrant a dismissal.

It is a privilege of vakeels, and I think it is very much to the interest, of the public at large that they should have that privilege. They are admitted to that honorable profession on proof of their capacity and of their good moral character. Unless it is shown that they are possessed of the requisite capacity and good moral character they cannot be admitted. But when once admitted, unless on proof of specified misconduct, they cannot be removed from that profession.

It appears to me that there has been no such proof on this occasion, and that no ground existed under Act XVIII. of 1852 for the removal of the petitioner.

Therefore I entirely agree in the judgment of the Chief Justice, and in quashing the order passed by the Judge of Shahabad.

CALCUTTA HIGH COURT.

The 23rd November, 1875.

PRESENT:

Mr Justice Jackson and Mr Justice McDonell

MATUNGEE CHURN MITTER* (*Plaintiff*)

versus

MOORRARY MOHUN GHOSE and others (*Defendants*)

Putni Tenure, Sale of, for Arrears of Rent—Regulation VIII of 1819, *s.* 8, *cl.* 2, *and s.* 14—*Date of Publication of Notice.*

The fact that the receipt of the notice of sale was dated the 15th of Bysack, and therefore did not show that the notice had been published at some time "previous to that day," so as to satisfy the provisions of s. 8, cl. 2 of Reg VIII of 1819, was held not to be sufficient ground for setting aside the sale of a putni tenure for arrears of rent There being nothing in the receipt to show the date on which the notice was published, no injury to the plaintiff having been proved, and it appearing that more than the time prescribed by the Regulation had elapsed before the sale actually took place, the Court refused to set aside the sale

It would not be a "sufficient plea" within the meaning of s 14 that the receipt had been obtained or the notification published, on instead of previous to, the 15th of Bysack.

JACKSON, J.—In this case, the suit was brought for the purpose of setting aside the sale of 12-anna share of a putni tenure held by the defaulter. A great number of objections some of a frivolous kind, and some of an unjustifiable kind, have been brought forward in appeal, but the only one which deserves notice or which was seriously pressed is that where it is contended that the notice in this case does not appear to have been published before the 15th Bysack, the sale having taken place on the 3rd Joisto following Now, it is to be observed that the Legislature, in passing Regulation VIII. of 1819, for just and equitable purposes, prescribed a variety of forms required to be gone through by zemindars, on applying for the sale of a putni tenure for arrears accrued due thereon, some part of the procedure being carried out by officers of the Collector's establishment: and one of the matters prescribed by s. 8, cl. 2, is that the Collector should be satisfied of the service of the notice, either by the receipt of the defaulter, or of his manager; or, if that cannot be procured, then by the signature of three substantial persons residing in the neighbourhood. Then it says:—"If it shall appear from the tenor of the receipt or attestation in question, that the

---

* Vide 1, Indian Law Reports, Calcutta Series, p 175.

notice has been published at any time previous to the 15th of the month of Bysack, it shall be a sufficient warrant for the sale to proceed upon the day appointed." That and other rules having been so laid down, s. 14 of the same Regulation says:—"It shall be competent to any party desirous of contesting the right of the zemindar to make the sale, whether on the ground of there having been no balance due, or on any other ground, to sue the zemindar for the reversal of the same, and upon establishing a sufficient plea to obtain a decree with full costs and damages." The meaning of that provision, as it appears to me, is that, if the defaulter or the alleged defaulter should be able to make out that the zemindar was not in a condition to obtain the sale of his under-tenure, that there had been no balance due, or that the procedure enjoined by the Regulation had been neglected, so that the defaulter has been prejudiced by reason of that neglect, then the Civil Court is declared entitled to set aside the sale and to grant a decree to the plaintiff with full costs and damages. But it certainly would be no "sufficient plea" or substantial cause of complaint that the receipt in question had been obtained, or that the notification had been published on, instead of previous to the 15th of the month of Bysack. The law says that if it shall appear, that is, appear to the Collector, that the notice has been published at any time previous to the 15th of the month of Bysack, that shall be a sufficient warrant for the sale to proceed. Now, in the receipt which has been read to us in this case, the particular time of publication is not stated. The receipt is dated the 15th, and has the signatures of three substantial persons which is to be accepted only in case of inability to procure the receipt of the defaulter. It might very well be that the previous day or days had been spent in vain efforts to procure the signatures of the putnidar or his agent, and that the receipt was afterwards completed by the signatures of the munduls, obtained on the 15th of Bysack, and this might well have satisfied the Collector that the notice had been in fact published previous to the 15th. That being so, and no injury to the plaintiff being at all made out, it appears to me that the ground set up is wholly insufficient to induce this Court to set aside the sale. It may be added as it appears in this particular case that the sale, instead of taking place on the 1st of Joisto, did not take place until the 3rd, and therefore even if we assume that the publication had taken place on the 15th, still the defaulter had two days more than is prescribed by the Regulation.

The appeal is dismissed with costs.

HIGH COURT, N. W. P.

The 15th December, 1875.

Mr. Justice Pearson and Mr. Justice Turner.

CHUNNI* (*Defendant*) *vs.* THAKUR DAS and others (*Plaintiffs*).

Mortgage—Condition against Alienation—Auction-purchaser.

A transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable in so far as it is in defeazance of the mortgagee's rights.

Where, in contravention of a condition not to alienate, the mortgagor had transferr his proprietary right in the mortgaged property to a third person for a term of years, the Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt, unless such purchaser desired its continuance.

Certain property was mortgaged to the plaintiffs with a stipulation that it will not be transferred to any one until the principal with interest was repaid. A lease for a term of 11 years was, however, granted by the mortgagor.

The judgment of the High Court was as follows :—

The lease is not a lease merely for agricultural purposes, but a transfer of the interest of the proprietor for a term of years. Is it a violation of the condition against alienation ? It has been held that such conditions are introduced to protect the lien created by the mortgage, and that a transfer made in contravention of the condition is not absolutely void, but voidable so far as it is in defeazance of the mortgagee's rights. In the present case the mortgagees have obtained a decree for the sale of the estate in satisfaction of the loan. The existence of the lease may induce purchasers to offer a less price for the property than they would offer if they could obtain immediate possession. On the other hand, the lease may be an arrangement highly beneficial to the owner of the estate and thus a substantial increment to its value. The mortgagees will have obtained all that in equity they are entitled to, if the Court gives them a declaration that the lease will not be binding on a purchaser in execution of the decree, unless he desires its continuance. The decrees of the Courts below will be modified accordingly, but as the appeal substantially fails, we must order the appellant to bear the respondents' costs.

---

* *Vide* 1, Indian Law Reports, Allahabad Series, p 126.

HIGH COURT, N. W. P.

The 11th January, 1876.

Before Mr Justice Oldfield

QUEEN *vs* KULTARAN SINGH.*

Act X of 1872, ss 471 and 472—Offence against Public Justice

An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X of 1872

But notwithstanding, this the Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss 467, 468, 469, Act X of 1872, may not, except as is provided in s 472, try the accused person itself for the offence charged.

The case of *Sujatool* h, 22, W R Cr 49 followed (See 10, Bom H C Rep, p 7', and 7, Mad H C Reports, Rulings xvii and xviii)

An Assistant Collector trying a rent suit was of opinion that the defendant Kultaran Singh was guilty of an offence under s. 196 of the Penal Code (for using evidence known to be false), and his witness Bhikam Singh of one under s. 193, (for giving false evidence). That officer, therefore, acting in the capacity of Assistant Magistrate, proceeded to try the accused and sentenced each to one year's rigorous imprisonment.

The High Court called for the record of the case on the petition of Kultaran Singh.

OLDFIELD, J —(In delivering judgment said,—But it appears to me that, with reference to s 471, the Assistant Magistrate was not competent to try the petitioner for an offence under s 196, committed before him as Assistant Collector. S 471 is as follows.—" When any Court, Civil or Criminal, is of opinion that there is sufficient ground for inquiring into any charge mentioned in ss. 467, 468, 469, such Court, after making such preliminary inquiry as may be necessary, may either commit the case itself or may send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged."

This section seems to require that the Court shall either commit the case or send it to some other Magistrate, but not charge or try the person on its own charge. It appears to have been intended that the rule in s. 471 should have general application, with the one exception provided for in s 472. That section gives an exceptional power to a Court of Session to charge and try on its own charge a person for an

* I. L. I, Indian Law Reports, Allahabad Series, p 129.

offence committed before it when the offence is triable by the Court of Session exclusively; and s. 472, by thus exceptionally exempting a Court of Session from the operation of the provisions of s. 471, shows what the general effect and aim of those provisions was intended to be.

To permit the Court in the present case to charge and try for the offence committed before it would be interpreting s. 471 as giving the Court a higher power than is allowed to a Sessions Court A similar view of the effect of s. 471 was taken by the Calcutta High Court in *Sufatoollah.*

The convictions and sentences passed on Bhikam Singh and Kultuan Singh are annulled, and the Court is directed either to commit them for trial or to send the case to another competent Magistrate for disposal.

SHORT NOTES

PRIVY COUNCIL.

Family Custom—Primogeniture—Mitakshara Law—Joint and Separate Property—Impartibility.

Although an estate be not what is technically known in the north of India as a *raj*, or what is known in the south of India as a *polliam*, the succession thereto may, under a *kulachar*, or family custom, be governed by the rule of primogeniture.

Where the family to which ancestral property held in this peculiar manner belongs is subject to the Mitakshara law, and the property is not separate, the succession, in the event of a holder dying without male issue, is given to the next collateral male heir in preference to the widow or daughters of the deceased holder.

That an estate is *impartible* does not imply that it is separate, and so to be governed by the law applicable to separate succession.

Whether the general status of a Hindu family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession.

Since in documents between Hindus and in the Mitakshara itself it is not unusual to find the leading members of a class alone mentioned when it is intended to comprehend the whole class, a written statement of a family custom, whereby an impartible estate passes in the event of,

the holder dying without issue to *his younger brother or his eldest son*, need not be construed as limiting the collateral succession to the two cases named, but as providing generally that on failure of the direct male line, the nearest male heir in the collateral line shall succeed.

Vide 1, Indian Law Reports, Calcutta Series, p 153 (Appeal from Calcutta High Court), The 30th June and 1st July 1875—Chintamun Singh *vs* Nowlukho Konwari.

CALCUTTA HIGH COURT.

Superintendence of High Court in cases not appealable.

Under s 15 of 24 and 25 Vict, c. 104, the High Court will not interfere with the decisions of the Courts below in cases in which a special appeal is forbidden by s 27 of Act XXIII of 1861, and where there is no question of jurisdiction involved. (As to the cases in which the High Court will interfere under the powers conferred by s. 15 of the High Courts' Act, see note to *Tej Ram vs. Harsukh*, I. L. R, 1, All)

Vide 1, Indian Law Reports, Calcutta Series, p 180 (Sir Richard Garth Kt, C J, and Birch, J) The 17th September 1875 Lukhykant Bose, *Petitioner*

Inspection of Documents—Rules of High Court of the 6th June 1874, 50, 52, (Original Civil)

Where the defendant stated in an affidavit, that a schedule annexed thereto contained a list of all the documents in his possession or power relating to the suit, and a certain other document was not mentioned in the schedule, though referred to by the defendant in his written statement, *held* on the hearing of a summons to consider the sufficiency of the affidavit that the plaintiff could not cross-examine on the affidavit but could only show it was not an honest affidavit. The proper course was to apply for inspection of the particular document referred to in the written statement and omitted from the schedule, if inspection was needed.

Vide 1, Indian Law Reports, Calcutta Series, p 178 (Phear, J) The 14th February 1876—Kennelly *vs* Wyman.

Court Fees Act (VII. of 1870), Sch. I., cls. 11 & 12—Probate Duty, Exemption from—Interest in Partnership Property.

The testator, a member of the firms of *G. A. & Co.*, of Calcutta, and *O G. & Co* , of Liverpool, died in England, leaving a will, of which he appointed *C* in England and *O* in Calcutta his executors. As a

partner in the Calcutta firm, the testator was entitled to a share in an indigo concern and in certain immoveable property in Calcutta, and his share in these properties was, on his death, estimated, and the money-value thereof paid to his estate by the firm in Liverpool, and probate duty had been paid thereon by G in obtaining probate of the will in England. Shortly after the testator's death, the indigo concern was contracted to be sold, and the testator's name appearing on the title-deeds as one of the owners, O applied for probate of the will, to enable him to join in the conveyance and in any future sale of the other immoveable property. An unlimited grant of probate was made to O, who claimed exemption from probate duty in respect of the properties, on the grounds that duty had already been paid in England on the testator's share in them, and that there was no amount or value in respect of which probate was to be granted in India *Held* on a case referred by the taxing officer, that O was not entitled in obtaining probate, to exemption from the probate duty payable under Sch. I, cl. 12 of the Court Fees Act, in respect of the properties.

Vide 1, Indian Law Reports, Calcutta Series, p 168 (Sir R Garth Kt, C J and Pontifex, J) The 1st March, 1876—In the Goods of Gladstone (Deceased)

BOMBAY HIGH COURT.

Miras—Razinamah—Extinction of Miras right.

B, a Mirasdar, addressed a *razinama* to the Mamlatdar, resigning certain *miras* lands in favour of L (to whom at the same time he delivered possession of the lands), and containing no reservation or qualification · *Held* that the transfer to L was complete and the rights of B wholly extinguished.

Vide 1, Indian Law Reports, Bombay Series, p 91 (West and Nanabhai Haridas, J J.) The 22nd December, 1875 Tarachand Pirchand *vs* Lakshman Bhavani.

Undivided Hindu Family—Ancestral estate—Execution—Sale of a coparcener's interest—Tenancy in common—Partition.

In a suit by a member of an undivided Hindu family to have his right declared to a portion of the joint estate which had been sold by the Civil Court in execution of a decree against his coparcener alone.

Held that the plaintiff should have a decree declaring that he was entitled to joint possession along with the execution purchaser as te-

nant in common. But that if a division in *specie* were desired, a suit should be brought for that purpose.

Vide 1, Indian Law Reports, Bombay Series, p 95 (West and Nanabhai Haridas, J J) The 1st February, 876 Babaji Lakshman and another vs. Vasudev Vinayak

---

HIGH COURT, N. W. P.

Lambardar—Co-sharer—Profits—Revenue—Set-off.

Held (SPANKIE J dissenting), that a lambardar, who had paid an arrear of Government revenue out of the collections of subsequent years without reference to the co-sharer, was entitled, in a suit against him by a co-sharer for his share of the profits for such subsequent years, to claim in the suit a deduction on account of such payment.

Vide 1, Indian Law Reports Allahabad Series, p 137 (Full Bench) The 25th February, 1876—Udai Singh vs Jagannath

---

Pre-emption—Conditional Decree—"Final" Judgment and Decree.

The Court granting a decree to the plaintiff in a pre-emption suit is competent to grant the decree subject to the payment of the purchase-money within a fixed period, and if the decree holder fails to comply with the condition imposed on him by the decree, he loses the benefit of the decree

When a direction contained in a decree referred to the time at which such decree should become *final*, *held* (the case being one in which a special appeal lay) that such decree does not become final on being affirmed by the lower appellate Court, but on the expiry of the period of special appeal, or, where such an appeal was instituted, when the decision of the lower appellate Court was affirmed by the High Court.

(See 10, W R, p 53, and H C. R, N W P, 1868, p 254)

Vide 1, Indian Law Reports, Allahabad Series, p 132 (Spankie and Oldfield, J J) The 11th February, 1876 Shaikh Ewaz, vs Mokuna Bibi.

CALCUTTA HIGH COURT.

The 8th April, 1875.

PRESENT:

Mr Justice Macpherson, *Offg Chief Justice*, and Mr Justice Birch

ROY MEGHRAJ* (Defendant) *Appellant*,

versus

BEJOY GOBIND BURRAL and others (Plaintiffs) *Respondents*.

Review of Judgment—Act VIII of 1859 *ss*. 376, 378—*Power of Judge to review Judgment of his Predecessor.*

A Judge has no power to allow a review of his predecessor's judgment on the ground that he comes to a different conclusion on the facts of the case. The general words used in ss 376 and 378 of Act VIII of 1859 are controlled and restricted by the particular words, and it is only the discovery of new evidence, or the correction of a patent and indubitable error or omission, or some other particular ground of the like description, which justifies the granting of a review.

MACPHERSON, J.—In this case it appears that upon the 15th of September 1873, Baboo Nuffer Chunder Bhutt, the Offg. Additional Subordinate Judge of Moorshedabad, sitting as a Court of Appeal reversed the decision of the Moonsiff of Jungipore. On the 30th of May and 1st of June 1874, Baboo Nuffer Chunder Bhutt having ceased to hold the office of Additional Subordinate Judge of Moorshedabad, Baboo Nobo Kumar Banerjea, the Second Subordinate Judge of that district, admitted a review of the judgment of Baboo Nuffer Chunder Bhutt, and, reversing his decision, restored and confirmed the decree of the Moonsiff of Jungipore. It is objected in special appeal that Baboo Nobo Kumar Banerjea had no power to review the judgment of Baboo Nuffer Chunder Bhutt, that no sufficient reason was shown for his reviewing it, and that his proceedings ought to be set aside. For the respondent it is contended that whether the review was rightly or wrongly admitted, the matter is not one which can be questioned in special appeal.

It appears from the judgment of Baboo Nobo Kumar Banerjea that he admitted the review, not upon the ground of the discovery of any new matter or evidence which was not within the knowledge of the party applying for review at the time of the original hearing, nor in order to correct any patent error or omission, nor for any other particular defect in the judgment of Baboo Nuffer Chunder Bhutt. He granted the review upon the general ground, that having gone into the case in all its details, he came to a conclusion on the facts different from that at which Baboo Nuffer Chunder Bhutt had arrived.

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 197.

There is no doubt that it is an eminently unsatisfactory and inconvenient state of things, if one Judge succeeding to the office of another, is at liberty to review and rehear all the cases decided by his predecessor, and to dispose of them afresh according to the view which he may happen to take of each. It would be almost equally inconvenient that a Judge should be bound, or should be permitted, perpetually to rehear the cases which he has himself decided, upon every occasion that a party, who is dissatisfied with a decision which has been passed, chooses to ask him to go again through the evidence upon which he has already decided.

But the law, though providing for a review of judgment in certain special cases, does not, under color of a review, authorize rehearing for the purpose merely of seeing whether the Judge, on going again through the case, will arrive at a different conclusion. When a case is reheard, the Court goes through the evidence, and decides afresh upon it. But a review can be given only for certain particular reasons: and it cannot be given merely for the purpose of allowing the parties to re-argue the case upon the evidence upon the chance of eventually throwing doubt on the soundness of the decision already passed. As Sir Barnes Peacock says, in the course of his judgment in the Full Bench case of Nassiruddeen Khan "I have on more than one occasion observed that an attempt was made to obtain a review of judgment upon the ground that, upon the first hearing, the Court had determined the facts contrary to the weight of evidence. This is matter for appeal, not for a review."

The sections of the Civil Proceedure Code which deal with this subject are no doubt very loosely framed. Under s. 376, the ground upon which a review may be granted is stated to be the discovery of new matter or evidence which was not within the knowledge of the party applying for the review, or which could not be adduced by him at the time when such decree was passed, or any other good and sufficient reason. In s. 378, the grounds indicated are the correction of an evident error or omission, or its being otherwise requisite for the ends of justice. These sections show that the intention of the Legislature was that a review should be granted only on the discovery of new evidence or for the correction of some patent error or omission, or for some such cause. For example, if a deed is dated a hundred years ago, and the Judge, accidentally misreading it, thinks it is dated only twenty years ago, and decides the case accordingly; or if the Judge erroneously sup

poses that the witnesses all stated that the plaintiff lived at A and decides the case accordingly, whereas the witnesses all stated that he lived at Z and not at A,—in such cases, and in any other in which there has been a clear and evident slip or error on the part of the Judge, a review may rightly be admitted. In short, the object of a review is, either to admit new evidence, or to enable the Judge to rectify any patent error, whether of fact or of law, into which he finds he has fallen.

Ss. 376 and 378 give no authority to a Judge, on an application for a review, to rehear the whole case upon the evidence, merely because one of the parties is dissatisfied with his original decision. It is true that in s. 376 there is a general provision that review may be applied for by any one who, from the discovery of new evidence "or from any other good and sufficient reason, may be desirous of obtaining a 'review,' and that s. 378 says, a review may be granted if it is necessary to correct an evident error or omission or is otherwise requisite for the ends of justice." But it is a well-known rule, that in interpreting Acts of the Legislature, general words are controlled and restricted by particular words. And we are of opinion that the general words used in these two sections are controlled and restricted by the particular words; and that it is only the discovery of new evidence or the correction of an evident (*i. e*, patent and indubitable) error or omission, or some other particular ground of the like description which justifies the granting a review. In the present case, none of the grounds specified, existed, nor did any ground of the like description.

But it is contended that by s. 378 the order, whether for granting or rejecting an application for review, is final. This question, however, has practically been disposed of by the recent decision of a Full Bench in the case of *Bhyrub Chunder Surma Chowdry* (1). The Court there held that the parties in a special appeal are entitled to shew that there has been an error or defect in procedure in the granting of the review, which has affected the decision of the case on the merits, by producing a different decision from that which has in the first instance been come to. As in that case it appeared to the learned Judges that no ground had been shown on which a review could legally be granted, so we are of opinion that in this case no ground is shown upon which a review could legally be granted.

* * * * * * * * * * *

(1) 11, B. L. R., 423.

HIGH COURT, N. W. P.

The 13th March, 1876.

PRESENT:

Mr. Justice Spankie and Mr. Justice Oldfield.

HOSAINI BIBI * (Defendant) *Appellant*,

versus

MOHSIN KHAN (Plaintiff) *Respondent*.

Act VIII of 1859 *s.* 327—*Arbitration—Award—Appeal.*

The plaintiff sought to file and to enforce a private award, under the provisions of s. 327, Act VIII of 1859. The defendant objected that he was no party to the award. The Court to which the plaintiff's application was made, after enquiry into the matter, over ruled the objection, and directed that the award should be filed, but made no decree enforcing the award under the provisions of Chapter VI of Act VIII of 1859. *Held*, that the order was not open to appeal as it did not operate as a decree.

Per Spankie, J.—S. 327 intended to provide for those cases only in which the reference to arbitration is admitted and an award has been made; where the defendant denies referring any dispute to arbitration or that an award has been made between himself and the plaintiff, sufficient cause is shown why the award should not be filed. The plaintiff should be left to bring a regular suit for the enforcement of the award.

SPANKIE, J.—The prayer of the plaintiff in this case was to be allowed to file a private award of arbitrators in Court, and for the enforcement of the award. The defendant (since deceased) denied that he had authorised his agent to refer any matter to arbitration, and repudiated the whole transaction. The Munsiff after going into the merits admitted the award in the following terms:—"I therefore decree the plaintiff's claim to file the arbitration award under s. 327, Civil Procedure Code, with costs and interest at 6 per cent., to be paid by the answering defendant (the widow of the original defendant, deceased)." It does not appear that he made any decree enforcing the award under the provisions of Ch. vi. of the Act.

The defendant appealed. The Subordinate Judge treating the order as a judgment under s. 325 of Act VIII. of 1859 held that it was final, and that there was no appeal. The Subordinate Judge cites as his authority the Full Bench decision of this Court in the case of *Jokhun Rai** and others, appellants.

It is contended in special appeal that, as it was urged in both the

---

* *Vide* 1, Indian Law Reports, Allahabad Series, p. 150.

* H. C. R., N.-W. P., 1868, p. 358.

lower Courts that the original defendant was no party to the award, the Subordinate Judge was bound to determine whether this was so or not.

For respondents the Full Bench ruling of this Court† and other precedents of the Presidency Court are cited as ruling that there was no appeal.

I am of opinion that we are bound by the decision of the Full Bench of this Court,† and that we must hold that there is no appeal from the order of the Munsiff allowing an award to be filed. At the same time it appears to me that s. 327 intended to provide for those cases only in which a reference to arbitration is admitted, and in which an award has been made. Where one of the parties denies that he had referred any dispute to arbitration, or that an award had been made between himself and the other party, it seems to me that sufficient cause has been shown why the award should not be filed. The applicant for its admission should be left to bring a regular suit for the enforcement of the award. Such, I may add, would appear to be the opinion of the dissenting Judge in one case decided by the Full Bench of the Presidency Court on the 23rd May, 1871.‡ But the Full Bench judgment of this Court must I think be followed by us as being applicable to this case, and I would therefore dismiss this appeal with costs.

OLDFIELD, J.—I concur in dismissing the appeal with costs. I think we are bound by the Full Bench ruling of this Court, and must hold that the order of the Munsiff under s. 327, Act VIII. of 1859, for filing the award does not operate as a decree and is not appealable.

BOMBAY HIGH COURT.

The 16th February, 1876.

PRESENT:

Mr Justice Westropp, *Chief Justice*, Mr Justice West and Mr Justice Nanabhai Haridas, J J

GUMNA DAMBERSHET§ (Plaintiff) *Appellant*,

versus

BHIKU HARIBA and another (Defendants) *Respondents*.

Limitation—Promissory Note payable by instalments—Waiver of default.

A promissory note, dated 2nd April 1868, stipulated that the principal amount with interest was to be repaid by half-yearly instalments of Rs 150 each, and that, in the event

---

† H. C. R., N. W. P., 1868, p. 353.

‡ 8, B. L. R., 315, S. C., 15, W. R., F. B., 9

§ *Vide* 1, Indian Law Reports, Bombay Series, p. 125.

of any one of these instalments not being punctually paid, the whole amount was to become payable at once. Default was made in payment of the first instalment, which fell due on the 2nd October 1868 In an action brought on the 19th October 1871 for the recovery of the whole amount,

Held that the right to bring the suit under Act XIV of 1859, Section 1, Clause 10, accrued to the plaintiff on the 2nd October 1868, and that, having omitted to bring it for more than three years, he was too late in instituting it on the 19th October 1871.

Held, also, that the plaintiff's right to the immediate payment of the whole amount was not, under the note, subject to be defeated by any subsequent payment, and that no such subsequent payment (assuming it to have been made) could, in the absence of any fresh agreement, supersede or suspend such right

The proposition laid down in Ramakrishna Mahadev *vs* Bayagi Santagi (5, Bom. H C. Rep., 35 A. C J) "that, although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed , and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendants rely upon it as making the whole debt due and fixing the period from which the time of limitation ran", over-ruled, as there is nothing in Act XIV of 1859, to give any such effect to an acceptance of part payment after the whole debt has become due

NANABHAI HARIDAS, J.—This is a suit upon a promissory note dated the 2nd April 1868. The note, among other things, stipulates that the principal amount, with interest at 12 per cent. per annum, is to be repaid by half-yearly instalments of Rs 150 each, and that, in the event of any one of those instalments not being punctually paid, the whole amount is to become payable at once.

The first instalment accordingly fell due on the 2nd October 1868, when it was not paid, and this suit was instituted on the 19th October 1871. The Subordinate Judge and the District Judge in appeal have both held it barred by the law of limitation; and the only question, therefore, which we have to determine now is, is it so barred ?

The law of limitation applicable to this case is Act XIV. of 1859, of which Clause X, Section 1, provides as follows :—

"To suits brought to recover money lent or interest, or for the breach of any contract in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of three years from the time when the debt became due, or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered (within six months from the date thereof)."*

* The words within brackets were altered by Act XX. of 1866, Section 27, to "within the time prescribed in that behalf by the Indian Registration Act, 1866."

The promissory note in this case is "a written engagement or contract" within the meaning of that clause, which "could have been registered" under Act XX. of 1866, Section 18, "at the time and place of the execution thereof," but was not. The period of limitation, therefore, within which a suit may be brought upon it is "three years from the time when the debt became due." We are thus brought to the question, when did the debt for which this suit is brought, become due?

The defendants, *(inter alia,)* contend that, upon their failure to pay the first instalment on the 2nd October 1868, the whole money became payable at once under the express stipulation to that effect in the promissory note, and that, therefore, this suit, which was not brought till the 10th October 1871, is barred.

The plaintiff, on the other hand, contends that, notwithstanding the defendants' failure to pay the first instalment at the time it fell due —namely, on the 2nd October 1868—he waived his right to exact payment of the whole amount by subsequently accepting payment of that instalment; that, therefore, until a second default was made in the payment of the next instalment six months after, no right would accrue to him to demand any payment; and that this suit, which is within three years from such second default, is consequently not barred.

Neither the Subordinate Judge nor the District Judge has found whether the plaintiff's allegation as to the subsequent payment to him of the amount of the first instalment by the defendants is proved, and if we thought such payment could make any difference, it would be necessary to have that expressly found by the Courts below. But it seems to us to be immaterial. The note sued on, as already stated, distinctly stipulates that, on failure to pay any one instalment, the whole amount shall at once become due. That contingency having happened on the 2nd October 1868, the plaintiff became entitled to the whole of the money at once*. He might, accordingly, have sued for the whole amount any day after that date. His right to immediate payment thereof was not, under the note itself, subject to be defeated by any subsequent payment, nor was it superseded or suspended by any fresh agreement between the parties; and we do not see how, under the circumstances, any such payment, by the defendants, of part of that for which they had already become liable could, in the absence of any fresh agreement, supersede or suspend such right. There is not any fresh agreement alleged here. The suit is brought on the note itself.

* 7, W. R., p. 21; 7, Bom. H. C. Rep., 125, 11, Idem, 155; 1, Mad H. C. Rep., 209.

In *Ramkrishna vs. Bayaji** it was, no doubt, held by a Division Bench of this Court, consisting of Couch, C. J., and Newton, J., "that, although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed, and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendants rely upon it as making the whole debt due and fixing the period from which the time of limitation ran." But we are unable to accept that view. There is nothing in the Limitation Act (XIV of 1859) to give any such effect to an acceptance of part payment after the whole debt has become due. The creditor is, no doubt, not bound immediately to sue for, or insist upon payment of the whole debt. He may, if he chooses, show forbearance towards his debtor, and accept a part of what is due. But, if he does so, he does not thereby prevent, or change in any way, the operation of the law of limitation, which, notwithstanding any such subsequent wish on his part, begins to run from the time of the first default rendering the whole amount due: see *Hemp vs. Garland* (1), *Hurronath vs. Maheeroolah* (2), *Karuppannan vs. Nallanama* (3), *Narayanappa vs. Bhaskar* (4), *Naralmal vs. Dhondiba* (5).

In equity it has been held that, a debt being presently due, an agreement to pay by instalments, with a stipulation, that on default the creditor may demand immediate payment of the whole balance due with interest, is not to be relieved against: *Sterne vs. Beck* (6).

Assuming, therefore, that the alleged part payment by the defendants really took place, if the plaintiff in this case had chosen the very next day after such payment to sue for the whole of the amount then remaining unpaid, he might have done so, and we do not think the defendants in that case could have successfully contended that no cause of action had accrued, or that the suit was premature because the second instalment had not fallen due.

We must, accordingly, hold that the right to bring this suit accrued to the plaintiff on the 2nd October 1868, that, having omitted to bring it for more than three years, he now comes too late; and that the decrees of the Lower Courts rejecting his claim on that ground are correct, and must be upheld.

* 5, Bomb H. C. Rep., 35

(1) 7, Jur 302, (2) 7, W. R. (F. B.) 21 (3) 1, Mad H. C. Rep., 209 (4) 7, Bom. H. C. Rep., 125, C. J. (5) 11, Bom H. C. Rep., 155 (6) 32, L. J. Ch. 682.

ON DAMAGES FOR INJURY TO CHARACTER AND FEELINGS.

Injury to character by slander is rarely such as to demand large compensation, unless some special damage has been sustained, as in the case of a servant, or a clerk, who loses employ in consequence of defamation. In such cases, the compensation should be adequate to the loss; and so also in the case of a tradesman, or a professional man, whose business has been reduced by depreciating his credit or skill. When the object is merely exculpation, damages should be small, though substantial, a sum of Rupees two hundred at the greatest will atone for all the injury that any man can receive from verbal and undeserved reproach Character must already be very low, if an action for defamation is necessary to acquit a man of the reputation of being a rogue or a felon, because an angry neighbour has called him by the opprobrious term, where an action is resorted to, not for exculpation, but for satisfaction it still less deserves encouragement, such an action for slander alone, is in its nature vindictive, nor can any apology be suggested for it, except that as angry feelings must have vent, it is better for them to expand in the way of litigation than of personal encounter. If human infirmity is such that man must resort either to law or to blows, then it is expedient to favor the first alternative; still, damages must be proportioned to injury, and the actual injury derived from foul language is small indeed, even in the most aggravated case: we have no remark to offer on the principle of assessing it beyond this, that the damage is commonly in an inverse ratio to the rank of the complainant; even when no special damage can be proved, a servant is entitled to more compensation for being called a thief, than the master to whom the same term may happen to be applied with equal malice.

(1) Damages are not awardable for a groundless and malicious charge of abetment of riot and murder. 5, W. R., 134.

(2) The mere failure of a complainant in proving a *bond fide* criminal charge does not make him liable to an action for damages for defamation. 5, W. R., 282. (Brojonath Roy.)

(3) A suit for damages for mere verbal abuse, without actual injury and damage done, does lie in the Civil Courts. 1, W. R., 19. (Moulvi Gholam Hossen Vakeel.)

(4) Damages may be recovered for injury to one's reputation. 7, W. R., 117. (Ramjeebun Mookerjee.)

(5) In a suit to obtain damages for defamation contained in a letter written and sent by defendant to plaintiff, where the only damage alleged was injury to plaintiff's feelings,—*Held* that such injury was not in itself a ground for giving damages in a civil action. 10, W. R, p. 184. (Komul Chundra Bose.)

(6) A father, as guardian of his minor son, can sue to recover damages for personal injuries received by the son. 9, W. R, 327. (Modhoosudun.)

(7) In an action for damages against N for bringing a false and malicious charge, and against M for being the instigator, and others for giving false evidence in the case,—*Held* that plaintiff's failure to prove instigation on the part of M did not affect the claim against N, and upon the defendant N to show that he had reasonable and sufficient cause for bringing it, and if he failed to show such cause, malice might be inferred.—*Held*, further, that plaintiff could not recover damages against the defendants who were witnesses, but his proper course was to obtain the leave of the Magistrate to proceed against them for perjury. 11, W. R, p 42. (Beshonath Rukhit.)

(8) A suit for damages for personal injury cannot be tried by a Court of Small Causes, unless some actual pecuniary damage has resulted from the injury. 12, W. R, 477. (Ali Buksh.)

(9) A plaintiff who comes into Court with a monstrously exaggerated statement of injury sustained, is only rightly served if the Court dismisses his claim *in toto*, although some injury was found to have been sustained by him. 8, W. R, p 476. (Thakoor Lalut Narain Deo.)

(10) If A. having reasonable grounds for believing that B has stolen his property, prosecutes him for theft, the acquittal of B is no ground for recovering damages in a civil suit against A. 6, W. R, 245. (Mohendro Nath Dutt.)

(11) Damages cannot be claimed for mere abuse or threatening language. 12, W R, 369. (Phoolbassee Koer.)

(12) In estimating damages for a malicious prosecution, a Civil Court is not necessarily wrong in taking into consideration the plaintiff's feelings. 12, W. R, p. 89. (Huro Lall Biswas.)

(13) Injury might result to a man's feelings from abuse such as would entitle him to damages 6, W. R., 151. (Shaik Tukee.)

(14) Greater damages are not necessary for defamation of the character of a Principal Sudder Ameen's Vakeel than for that of a Sudder Ameen's Vakeel. 6, W. R., p. 25. (Ramsoonder Mookerjee)

(15) In a suit for damages for defamation of character, the plaintiff is not required by any absolute rule of law to give affirmative evidence of the falseness of the charge.

Quære.—Before a suit can lie in a case of this kind, is it necessary to presume that actual pecuniary damage has resulted? 12, W. R., 372. (Dhurmo Doss Koondoo)

(16) In an action for damages for severe assault, the defendant being unable to prove provocation, the lower Court's decree against him was in the main upheld; but as, looking to the position of the defendant, the damages awarded were deemed beyond his means, they were reduced on condition of the defendant tendering to the plaintiff a written apology expressing his regret for what had passed 6, W. R., 95. (J. K. MacIver.)

(17) Special damages are not necessary to be proved in a case of slander and assault. W. R, 1864, p 302. (Meer Hossein.)

(18) In a suit for damages for an assault made without provocation, the damages given should be commensurate to the injury and annoyance caused, even though there has been no serious personal injury sustained. W R, 1864, p 370. (Runjoy Muzoomdar)

(19) A suit will not lie to obtain damages for defamation contained in two letters written and sent by defendant to plaintiff, when no other publication was alleged, and no other injury than that of injury to the plaintiff's feelings. 6, N. W. P. High Court Rep., p. 38. (Mahomed Ismail Khan)

(20) Assault and abusive language were held to have the effect of injuring one's reputation and outraging his feelings, although mere verbal abuse without consequent injury would give no claim to damages. 18, W R, p. 531. (Chunder Nath Dhur)

(21) In a suit for damages on the ground that defendant made a false charge of defamation against plaintiff and had him arrested and taken before the Magistrate who dismissed the charge, *Held* that the essence of the case lay in the question whether or not the complainant had reasonable ground for complaining before the Magistrate that the plaintiff had defamed him. Malice would be inferred from the absence of reasonable cause. 20, W. R, 177. (Gunga Persaud)

(22) A suit for recovering damages for abuse will lie in the Civil Court. 16, W. R, p. 83.

SHORT NOTES.

PRIVY COUNCIL.

Family Custom—Regs. XI. of 1793 *and X. of* 1800*—Discontinuance of Family Custom.*

In a suit to recover possession of an estate by virtue of an alleged family custom, under which the estate was descendible to the eldest son to the exclusion of the other sons and was impartible and inalienable, it was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. *Held*, assuming the custom to have existed, that although by such settlement any incidents of the old tenure of the estate were impliedly at an end, yet the settlement did not of itself operate to destroy the family usage, even though the origin of it could not be shown.

Quære—Whether Regulation XI. of 1793 or Regulation X. of 1800 would govern a case where the claim rested only on a continuing family usage?

Held on the evidence, that from the acts of the members of the family the manner of succession to the estate, even if it prevailed as alleged, was probably not regarded by them in the light of a family custom, but as one of the incidents or conditions of tenure and that since the settlement by Government the family had considered all these incidents at an end, and had treated the estate as an ordinary estate held under the Government, and subject to the ordinary laws of succession. Assuming the custom to have existed, it was of a nature which could, without any violation of law, be put an end to. There appears to be no principle or authority for holding that a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued either accidentally or intentionally, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails.

Vide 1, Indian Law Reports, Calcutta Series, p 186 (Appeal from Calcutta High Court) The 23rd, 24th and 25th July and 26th November 1872—Rajkissen Singh, *vs.* Ramjoy Surma Mozoomdar.

CALCUTTA HIGH COURT.

Review—Act VIII. of 1859, *s* 376—*Error in Law.*

The production of an authority which was not brought to the notice of the Judge at the first hearing, and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for granting a review.

Vide 1, Indian Law Reports, Calcutta Series, p 184 (Sir Richard Garth, Kt, C J, and Birch, J) The 28th August 1875 —Ellem and another *vs* Basheer and another

Bengal Act VIII of 1869, *s* 98—*Suit for Value of Crops—Distraint—Jurisdiction—Small Cause Court.*

The plaintiff made a complaint to the Magistrate against the defendant, his landlord, for forcibly carrying away his crops, whereupon the defendant was tried, convicted of theft, and punished. The plaintiff then instituted a suit against the defendant in the Munsiff's Court, apparently under s. 95 of Beng Act VIII. of 1869, and obtained a decree declaring the distraint to be illegal and directing the crops to be given up to him. The defendant offered to give up a smaller quantity than was mentioned in the decree The plaintiff refused to take the same, and brought a suit in the Small Cause Court to recover the value of the quantity he had claimed before the Munsif and something additional. *Held,* that the Small Cause Court had no jurisdiction, and that the suit ought to have been brought under s 98 of Beng Act VIII of 1869.

Vide 1, Indian Law Reports, Calcutta Series, p 183, (Sir Richard Garth, Kt, C. J, and Macpherson, J) The 15th July 1875—Hyder Ali *vs* Jater Ali

BOMBAY HIGH COURT.

Hindu Law—Effect of illegitimacy on the right of succession—Dasiputra—Pât marriage or re-marriage amongst Sudras.

The general result of the authorities, both juridical and forensic, is that among the three regenerate classes of Hindus, (Brahmans, Kshatriyas, and Vaishyas,) illegitimate children are entitled to maintenance, but cannot inherit, unless there be local usage to the contrary; and that, among the Sudra class, illegitimate children, in certain cases at least, do inherit.

According to Vijnyaneshvara, the author of the Mitakshara (Chap. I, Section 12), the father of an illegitimate son by a *Dasi* among Sudras may in his (the father's) life-time allot to such son a share equal to that of a legitimate son, and, if the father die without making such allotment, the illegitimate son by the *Dasi* is entitled to half the share of a legitimate son, and, if there be no legitimate son and no legiti-

mate daughter or son or such a daughter, the illegitimate son by the *Dasi* takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son, and such daughter or daughter's son would take the residue of the property, subject to the charge of maintaining the widow of the deceased proprietor.

The *dictum* of Lord Cairns in *Sri Gajapathi Radhika* vs. *Sri Gajapathi Nilamani* (13, Moore Ind. App., 497, S. C., 6, Beng. L. R., 202, 14, Calc. W. R., P. C., 33, reversing 2, Mad. H. C. Rep., 369,— "Supposing the sons, or either of them, to have been legitimate, the widow (of Padmanabha) could have been entitled to maintenance only. Had both the sons been illegitimate their claim, unless some special custom governed the case, (which is not in proof,) would have been to maintenance only. In this last-named case the widow would have had the ordinary estate of a Hindu widow"—commented upon and explained.

The condition that, in order to entitle the illegitimate offspring of a Sudra woman by a Sudra to inherit the property of the latter, or a share in it, she should, according to Jimuta Vahana and Nilkantha, be an unmarried woman, has, in practice, been discarded in the Presidency of Bombay.

In this Presidency the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra.

The sons of a *Punarbhu* (twice-married woman) by a duly contracted Pât marriage, *i. e.*, in accordance with the custom of the caste, are legitimate and, as to the right of inheritance and extent of shares, rank on a par with the sons by *lagna* marriage.

G., a Sudra woman, was married to T (also a Sudra) by *Pât* marriage, without having received a *chhor chitti* (release) from her first husband, who was then living, obtained any other sanction of her *Pât* with T.—

Held that the intercourse between G and T was adulterous, and that, therefore, the plaintiff their son, being the result of such intercourse, was not entitled to take as *heir* even to the extent of half a share, and was not a *Dasiputra* within the scope of Yajnyavalkya's text, or recognized as such by other commentators. He was, however, held entitled to maintenance, as he had been recognized by T as his son.

* Vide 1, Indian Law Reports, Bombay Series, p. 97 (Westropp, C. J., and Larpent, J.) the 7th September 1875 Rahi vs. Govinda Valad Teja.

Hindu Law—Contract—Married woman—Capacity of a Hindu female to enter into a contract without her husband's consent—When such contract is binding on the husband—Stridhan

Under the Hindu law a wife who has voluntarily separated from her husband, without any circumstances justifying her separation, is liable for debts contracted by her (even for necessaries), although without her husband's consent, but her liability is limited to the extent of any *stridhan* she may have

Vide 1, Indian Law Reports, Bombay Series, p 121, (Westropp, C J, and Nanabhai Haridas, J) The 16th February 1876—Nathubhai Bhailal vs Javher Raiji

---

Will - Probate—Annuity—"Value"—Court Fees Act (VII. of 1870), Schedule I Clause 11.

For the purpose of determining the probate fee to be paid in respect of an annuity the word "value" in the Court Fees Act (VII of 1870), Schedule I, Clause 11, must be taken to mean the market value of the annuity and not ten times the amount of a yearly payment

Where the property, in respect of which probate is sought, is mortgaged, the amount of the mortgage incumbrance must be deducted from the market value of the property, and the probate fee charged on the balance.

Vide 1, Indian Law Reports, Bombay Series p 118, (Westropp, C J) The 29th January 1876—Vinayakrav Ramachundra Lakshmanji

---

Injunction—Libel—Ultra vires—Bombay Act I. of 1873

The Court will not grant an injunction to restrain the publication of a libel, nor to restrain, at the suit of an individual, an act of a corporate body, on the ground of such act being *ultra vires*, except where such individual has been damaged by such act in his rights of ownership, commodity, or easement.

There is no authority for the proposition that an individual is entitled to protection by way of injunction against the act of a corporation, though in excess of their powers, which affects that individual's character and reputation, whether private, professional, or commercial, which he would not have been entitled to had the act complained of been committed by an individual defendant, on the ground that the act in question was one which the corporation had no power to do under the instrument of incorporation.

The Trustees of the Port of Bombay have the power to record their decisions and opinions with regard to matters connected with the business they have under their Act power to transact, whether such decisions or opinions are confined to statements of what they believe to be actual facts, or extend also to the giving of advice for the conduct of their successors in office with regard to such business, and whether the expression of such decisions, opinions, or advice may or may not contain statements injurious to the character or reputation of others.

Where therefore, the plaintiff sought for an injunction to restrain the Trustees of the Port of Bombay from publishing two resolutions alleged to reflect injuriously on his character and reputation, on the ground that it was not within the powers conferred on the Trustees by Bombay Act I of 1873, to discuss or pass resolutions affecting his character, and that the publication of such resolutions was calculated to injuriously affect him in his commercial relations with Government,

Held that the injunction could not be granted

Held also that though the Court, under certain circumstances, might have the power of so framing an order for injunction as to produce the effect of cancelling the minutes of a resolution recorded in the books of a corporate body, yet that it could not order the Trustees of such body to pass and record a resolution dictated by the Court.

Vide 1, Indian Law Reports, Bombay Series, p. 132, (Green, J) The 30th March 1876—Shepherd *vs* The Trustees of the Port of Bombay

HIGH COURT, N. W. P.

Act X. of 1872, *s.* 297—*High Court—Powers of Revision—Judgment of Acquittal.*

The High Court is not precluded by a judgment of acquittal from exercising its powers of revision under s. 297, Act X. of 1872.

Vide 1, Indian Law Reports, Allahabad Series, p 139. (Full Bench). The 19th February 1876—In the matter of Hardeo.

Act X. of 1872, *s.* 390—*Convicted Person—Bail—Sessions Court.*

The Court of Session has no power, under s. 390, Act X. of 1872, to admit a convicted person to bail, a *convicted person* not being an *accused person* within the meaning of that section.

Vide 1, Indian Law Reports, Allahabad Series, p. 151. (Full Bench.)—The 16th February 1876—Queen *vs* Thakur Pershad.

THE MORALITY OF THE BAR.

"I asked him," says Boswell, speaking of Dr. Johnson, "whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty.

Johnson. "Why no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge.

Boswell. "But what do you think of supporting a cause which you know to be bad?

Johnson. "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it; and if it does convince him, why, then, sir, you are wrong, and he is right. It is his business to judge: and you are not to be confident in your own opinion, that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

So said Erskine: "From the moment that any advocate can be permitted to say that he *will*, or will *not*, stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend from what *he may think* of the charge or of the defence, he assumes the character of the judge; nay he assumes it before the hour of judgment, and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

"There is, undoubtedly", said Coleridge, "a limit to the exertions of an advocate for his client. He has a right—it is his bounden duty—to do every thing for his client, that his client might honestly do for himself, and to do it with all the effect which any exercise of skill, talent, or knowledge of his own may be able to produce. But the advocate has no right, nor is it his duty, to do that for his client, which his client *in foro conscientiæ*, has no right to do for himself: as, for a gross example, to put in evidence a forged deed or will, knowing it to be so forged."

In our opinion, the duty of the advocate is to state, as forcibly as he can, the best arguments he can devise in his client's favor, leaving the value of these arguments, as well as the merits of the case, to be decided by the only individual who has the power of reaching the truth—the judge. "He is perfectly justified," says a writer in the FRIEND OF INDIA, "in defending a man whom he believes to be guilty—nay more whom he knows to be guilty. This does not mean that he may do anything for his client which he may not do for himself. He may not mis-state facts, or seek to substantiate what he knows to be a fraud. His duty is to see, however hopeless his client's case, that the charge is strictly proved and that if he is convicted, he is convicted according to law. He may and ought to take advantage of any weakness exhibited by the prosecution, and avail himself of every technical 'objection' that he thinks may tend to save his client. The plea of 'not guilty' is not to be taken as an assertion of moral innocence. The word 'guilty' implies much more than that the accused person committed a particular act. It implies that he committed it when sane, and with such intention, and under such circumstances, that his act amounts to a legal offence. It is one thing to kill a man, another to commit murder. And if—a very unlikely case indeed—a man were to come to me, accused of a crime, and confess it to me in such a way as to leave no doubt in my mind but that he deserved the punishment of the law, I should feel bound on the proper fee being paid to undertake his defence, unpleasant as the task would be. My duty would be to see that everything was strictly proved against the prisoner : but I should be clearly wrong if with the knowledge I possessed, I sought to save him by directing suspicions against an innocent person.* * * * * I have said that a Counsel is justified in defending a man whom he knows to be guilty: that is to say that he is entitled to call upon the accuser to strictly prove the offence urged against his client. But he is not of course justified in supporting a charge against a man, which his client tells him is false. In the first case he does what he may do for himself, and what is in strict accordance with law. In the other instance he does for another what he may not do for himself; and lends himself knowingly to be the instrument of a great wrong. However black a man's offence is, he has a right to have it proved before he is punished for it; but no man is justified in stating deliberately what he knows to be untrue. But as a matter of fact, it is an exceedingly rare occurrence for a barrister to have any personal knowledge of the truth of the fact which he is required to lay before a judge. The English

system which requires the intervention of a third person who is an expert, renders it peculiarly unlikely that such a one would inform the Counsel he instructs of his client's guilt, and thus do all he could to cramp the Counsel's energies. Here in India, where a barrister is often instructed directly by his client, the former it seems to me may safely undertake almost any case, as even after the most patient investigation before an acute judge it is difficult enough to say where the truth lies. There is doubtless a right and a wrong side to every case; but as long as a Counsel is careful never to state what he knows to be false, he may uphold either side, it being the judge's duty and not his, to pronounce which is the right and which the wrong side."

BOMBAY HIGH COURT.

The 16*th February*, 1876.

PRESENT :

Mr. Justice Westropp, *Chief Justice*, Mr. Justice Kemball, Mr. Justice West, and Mr. Justice Nanabhai Haridas.

REG., *vs.* RAHIMAT.*

Compounding of offences—Voluntarily causing grievous hurt—The Indian Penal Code, s. 214—*The Criminal Procedure Code (Act X. of* 1872*) s.* 210.

Whenever the words "voluntarily," "intentionally," "fraudulently," "dishonestly," or others, whose definition involves a particular intention, enter along with a specified act into the description of an offence, the offence not being one irrespective of the intention, is not one which the exception to section 214 of the Indian Penal Code by itself allows to be compounded. The offence, to admit of compromise, must be one in this sense irrespective of the intention, and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings.

The offence of voluntarily causing grievous hurt cannot accordingly be compounded.

The judgment of the Court was delivered by

WEST, J.—Section 188 of the Code of Criminal Procedure says that "in the case of offences which may lawfully be compounded, injured persons may compound the offence out of Court or in Court with the permission of the Court," and that "such withdrawal from the prosecution shall have the effect of an acquittal of the accused person." The case before us is one in which an accusation of voluntarily causing grievous hurt has been compounded with the permission of the Court;

* *Vide* 1, Indian Law Reports, Bombay Series, p. 147.

and the question is, whether this is a case of an offence "which may lawfully be compounded."

The remedies provided by the law for wrongs which it recognizes as affording a proper ground for the exercise of the State's coercitive power, may be classed generally as criminal and civil. The latter apply properly to wrongs not regarded as so flagrant and so dangerous to society at large as to call for the spontaneous interference of the State. The general well-being of the community is sufficiently protected by the exercise of power at the desire of the person injured, and on proof of the wrong. The object is in theory not penal, but remedial or compensatory.

Criminal sanctions, on the other hand, are intended to enforce duties regarded as of such importance to the community that the option of insisting on them, or of bringing the provided penalty to bear in cases of their infringement, cannot safely be left in the hands of private persons. In such cases the State, through its representatives, steps in either on a denunciation duly made, or of its own accord, to bring the wrong-doer to justice; and it regards this object as one of such paramount importance that it will not allow any purely remedial arrangement between the person injured and his injurer, by which the punishment prescribed for the latter may be avoided.

The views taken, however, at different times and under different influences, of the enormity of particular wrongs vary widely; and there are wrongs which, while they fall within the same general description, may, according to circumstances, be of an extremely pernicious, or of but a slightly pernicious, tendency. They may endanger the welfare of society, or they may affect, except in some inappreciable degree, only the interests of an individual. Hence there comes to be recognized a class of cases which may be the subjects either of criminal or civil cognizance. If the person injured desires to obtain compensation, the law does not forbid him; if he invokes the penal interposition of the Magistrate, that interposition is not refused.

Full competence to accept satisfaction for wrongs done to oneself follows necessarily from the general rule of freedom of transactions. That rule, however, and the deduction from it, are subject to limitations in the interest of the community through which some compromises of offences are made penal, and others are so disapproved that the Courts will not give effect to them. These limitations correspond generally to the classes of wrongs for which, though a personal injury has been sus-

tained, a civil suit is not allowed, or is allowed only after the public interest has been satisfied by a prosecution, the instituting of which is by the British Indian, as by the English, law regarded as a duty resting on the person injured, and one which he is not at liberty to neglect in co nsideration of any advantage to himself.

Sections 213 and 214 of the Indian Penal Code are intended to prevent the suppression of prosecut ions in cases in which the public is thought to be deeply interested in the punishment of the offender. They impose penalties on transactions ent ered into with this view. But after the rules have been laid down in terms extending to all compromises of offences, an exception is made that " the provisions of Sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action." The words " may bring a civil action" seem to mean " may bring an action without, or instead of, instituting criminal proceedings." On the principle of " *ubi jus ibi remedium*" there are but few, if any, violations of right recognized by the law as occasioning personal injury, for which, when the demands of criminal justice have been satisfied, a civil action may not be brought by the person injured; and the condition of a civil action being competent to the party injured after a prosecution could not have been intended where the design is to define and circumscribe the bounds within which private compromises of offences are permissible. The graver the injury in such cases, so long as the injured person survives, the better founded the claim for civil reparation. Where the law allows a choice between the criminal and the civil remedy, the exception says that a compromise shall not be penal by which the person injured obtains what civil proceedings would give him. The taking and giving of a compensation which the law forbids, instead of a criminal prosecution, is the gist of the offences in Sections 213 and 214; but where the law would itself award a compensation, the exception allows the compromise.

The condition thus construed at once cuts down the cases in which compounding is not penal to a limited class. Unless a " suit of a civil nature," according to Section 1 of the Code of Civil Procedure, can be maintained in the first instance by the person injured against the injurer, they are not at liberty to enter into a transaction by way of compromise. They are subject to the penalties of Sections 213 and 214 of the Indian Penal Code should they attempt thus to defeat its purpose. In all the more serious cases of wrong doing by which personal injury

is sustained, no such action could, according to the recognized principles of the English law, be maintained. The criminal law, wherever those principles are accepted, must first be put in motion, before civil redress for the private wrong can be effectually sought. That these principles were accepted, at least generally, by the Legislature when it passed the Penal Code, is, we think, sufficiently apparent from the test it has provided; and according to these it is only in cases comparatively trivial—at least, of trivial importance to the community at large—that an action can be brought without a prior prosecution. In no others is a compromise free from the penalties prescribed by by Sections 213 and 214 of the Indian Penal Code.

The other condition, that the "offence consists only of an act irrespective of the intention", seems to have the same general purpose of confining compromises to the cases of almost venial offences. The words "irrespective of the intention" seem to mean that the definition of the offence extends only to acts, not to a particular intention prompting or accompanying the acts. Thus the several instances of negligence constituting an offence without a positively mischievous purpose, are cases in which the "offence consists only of an act." No intention is, or needs be, imputed as an element of the offence. In other cases the act—as, for instance, waging war against the Queen, or committing adultery—though it may be essentially voluntary, is still conceived, for the purpose of the definition or of the imposition of punishment, simply as an act. If the act, as thus viewed by the Legistature, is done, the offence is committed, and the penalty is incurred "irrespective of the intention of the offender." In all cases of this kind for which the Indian Penal Code provides, the act is either one, as negligently allowing a prisoner charged with, or convicted of, an offence to escape, for which no civil action could be brought, and on that ground excluded from the operation of the exception: or else, as in the case of adultery, of a kind regarded as of a specially personal character, so that the public peace and welfare will be rather furthered than impaired by allowing a private settlement of the wrong.

In contrast to these cases stand the great mass of offences which arise in the ordinary course of affairs. In the definitions or descriptions of these in the Penal Code the intention is an essential element. The mere act, not perhaps in itself, but as viewed by the Legislature, is regarded as possibly ambiguous, and is not an "offence irrespective of the intention of the offender" according to a distinction well expressed

by Lord Mansfield, C. J., in the case of R. V. Shipley (4, Doug. p. 165). Thus, in cases of theft, personal violence, threats, and defamation, the physical act must spring from a dishonest or malicious intent in order to constitute an offence. This was the class of cases which probably was most conspicuous to the Legistature when the exception to Section 214 was made law. The offences are of a kind regarded as highly dangerous to society, and not, therefore, proper subjects of compromise. As their definitions involve intention, they were excluded from the exception by limiting it to cases of offences constituted by "acts irrespective of the intention of the offender."

The result appears to be that whenever the words "voluntarily," "intentionally," "fraudulently," "dishonestly," or others, whose definition involves a particular intention enter along with a specified act into the description of an offence, the offence, not being one "irrespective of the intention," is not one which the exception to Section 214 of the Indian Penal Code by itself allows to be compounded without the parties incurring the penalties prescribed by that and the next preceding section. The offence, to admit of compromise, must be one in this sense irrespective of the intention; and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings.

This construction of the exception does not, indeed, clear away all difficulties. It seems anomalous that, while adultery, through its definition not including any statement of intention as an element of the offence, may be compounded, enticing a woman away with intent to commit adultery with her may not be compounded. The anomaly may, perhaps, be explained by the circumstance that mere adultery may be a wholly private transaction, which the husband may hope to keep secret, while enticing a woman away, necessarily involves a public scandal; but, such as it is, it is in a measure corrected by the provisions of the Code of Criminal Procedure (Sections 478, 479), which make the prosecution of the offender in the one case, as in the other, dependent on the will of the husband. The attempt to compress a principle gathered from a great number of instances within a few words generally, leaves some cases not provided for in a quite satisfactory way; and the existence of such cases is not a sufficient argument against a particular construction, unless some other can be suggested which gets rid of all difficulties.

The illustrations to the exception, so far from throwing light on

its meaning, create the chief difficulties in its construction. Illustrations (*a*) and (*b*) taken together, if we take "assault," as Section 7 bids us do, in the sense defined by Section 351, suggest that the true sense of the exception is to allow compounding in every case that might be the subject of a civil action, except where the act constituting an offence is made a graver offence by some intention accompanying it, which is not involved in the definition of the minor offence, which the act would *primâ facie* amount to. The condition that, for the exception to operate, the act must be one for which a civil action might be brought before taking criminal proceedings, would, on this construction, as on the other, cut down the possible cases of compromise to a small number, where the principles of the English law on this subject prevail; but, allowing this, the difficulty remains that the suggested construction is one that is not by any ingenuity to be gathered from the language of the exception itself. If we take "assault" in its defined sense, it is not an offence constituted by "an act irrespective of the intention." The physical act being the same in both cases, the intention accompanying it might make it an assault under Section 351, or an attempt to commit murder under Sections 511, 299, and 300 of the Indian Penal Code; and there is not, in any of the cases in which intention enters into the definition of an offence in that Code, such an inseparable connexion of a particular intent with a particular act, that such intent is to be conclusively inferred from it; otherwise the intention would not be specified as part of the definition. But if the act thus derives all its criminal character from the particular intent accompanying it, it cannot be said that a minor offence is constituted by the act irrespective of the intention, while a major offence is constituted by a similar act along with some different or additional intention. There is no offence at all until there is a criminal intention; and when this accompanies the act, it at once determines the character of the offence, be it graver or more venial.

The illustrations of the Penal Code rank as cases decided upon its provisions by the highest authority. But as every authority may sometimes err, we are justified in asking whether this may have happened in the present instances. Illustration (*b*) says:—"A assaults B. Here, as the offence consists simply of the act irrespective of the intention of the offender, &c." This conception of the meaning of assault is obviously quite at variance with that which governed its definition in Section 351. The Legislature conceived of assault as consisting, as viewed by the law, in

some mere act. In illustration (*a*) an intention is superadded to this act, so that an attempt to commit murder is constituted an offence consisting by its definition of an act *plus* an intention, and thus not within the exception according to the construction which we have preferred. Illustrations (*c*) and (*d*) are equally reconcileable with either interpretation.

Amongst the cases actually decided on the exception there is one at 9, Madras Jurist, 341, in which it was ruled that a charge of dishonest appropriation under Section 404 of the Indian Penal Code could not legally be compounded. In the case cited from 3, Rev. Civ. and Cri. R., 14, S. C. Ct. References, a compromise in a case of wrongful restraint was successfully sued on; but wrongful restraint being punishable with but one month's imprisonment, a withdrawal from the prosecution is expressly allowed by Section 210 of the Code of Criminal Procedure; and as Section 188 of that Code cannot but have been meant to have some operation, an agreement for such withdrawal could not be illegal. The case at 22, Calc. W. R., 26, Cr. Rul., was one of kidnapping, and the Court held that it could be lawfully compounded. Ainslie, J., seems to have inclined to the view that this was allowable, because there was not an intention to commit an offence beyond that of simple kidnapping, and because a civil action might be maintained, but it does not appear that the obvious grammatical construction of the exception had been considered by him. Kidnapping, though a voluntary act, is not, according to its definition in the Penal Code, composed of an act *plus* intention, but of an act alone. It is, though necessarily involving an intention, conceived of and dealt with by the Legislature as a mere act; and being thus an offence irrespective of the intention would, according to our view, admit of a compromise if the second condition were satisfied, namely, that a civil action might be maintained for the wrong by the injured person. It is not certain from the language of Ainslie, J., that this was not his view also; but, if not, the decision is, we think, to be sustained where a civil suit is admitted, independently of the reasons given for it.

The case of *Jetha Bhala*, at 10, Bom. H. C. Rep., 68, is more distinctly against what we think the correct construction. But no reasons are given for that decision, and the case does not appear to have been argued. If the offence of voluntarily causing hurt may be compounded, so apparently might causing grievous hurt, or even an attempt to commit murder. For the mere act and the personal injury sustained from it, apart from any special criminal intent, the person injured

might, in each case, maintain a civil action; and there would not in either be an aggravating intention placing the offence in a graver category than that to which it would ordinarily belong. If the act was thought to include the intention ordinarily accompanying it, and thus in a manner to be one, in the eye of the law, irrespective of the intention, we do not think that such a construction is admissible in any case in which the Legislature has expressly made a particular intention part of the definition of an offence. It may be easy to infer the motive in any ordinary case from the act and the circumstances but that the inference was not intended to be a necessary and conclusive one, is clear from the specification of the intention in defining the offence. We think, therefore, that that case was not rightly decided, and that an offence, in the definition of which a particular intention is included, cannot be compromised legally, or without incurring a penalty, except in the petty cases provided for by Section 210 of the Code of Criminal Procedure. If the intention does not enter into the definition of the offence, it may be compounded in all cases in which a proceeding by way of civil action, instead of a criminal prosecution, would be competent to the person injured.

The offence of voluntarily causing grievous hurt is, accordingly, one which cannot legally be compounded. The Magistrate's order of dismissal must, therefore, be reversed as contrary to law.

* * * * * * * * * * * * *

CALCUTTA HIGH COURT.

The 2nd September, 1875.

PRESENT:

Sir Richard Garth, *Kt., Chief Justice,* and Mr. Justice Birch.

NOBO DOORGA DOSSEE* and another (Plaintiffs) *Appellants,*

versus

FOYZBUX CHOWDRY, (Defendant) *Respondent.*

Res judicata—Act VIII. of* 1859, *s.* 2—*Suit for Rent—Subsequent Suit for Abatement of Rent.

Where in a zemindar's suit for rent, the ryot claimed abatement of a certain sum, but the Court only allowed a smaller amount, a subsequent suit by the ryot claiming a permanent abatement of the amount at first claimed was held not to be maintainable, the question being *res judicata,* i. e., having been raised and decided in the former suit.

Vide 1, Indian Law Reports, Calcutta Series, p. 202.

In this case, the plaintiff obtained a putni lease of certain villages from the defendant in 1861 at an annual rent, and in 1865 was evicted from a portion of the property: she took no steps to obtain an abatement; but inasmuch as she did not pay any rent for the year 1871, the defendant brought a suit against her for the rent of that year. The plaintiff set up the defence that she was entitled to an abatement of Rs. 155 from her rent; the 155 rupees representing the annual value of the property which she had lost in consequence of the eviction. In that suit it was decided that the amount of abatement she was entitled to was Rs 42. No appeal was made against that decision. In a suit brought by the plaintiff for the purpose of obtaining a permanent abatement of her rent she claimed the precise measure of abatement, viz., Rs 155, which she had claimed in the suit brought against her by the defendant.

Garth, C. J.—(In delivering judgment, said:)—The plaintiff brings this suit for the purpose, as she says, of obtaining an abatement of her rent for the future; and she claims in this suit the precise measure of abatement, Rs. 155, which she had claimed in the suit brought against her by the defendant. The defendant's answer is, 'this question which you now seek to raise, has already been decided between us in the former suit. You claimed the same abatement then as you do now. You attempted to establish it upon the same grounds. You went into the question, not as if the abatement were for one particular year, but for the whole remainder of your interest; and from the very nature of the question, you could not have gone into it upon any other basis.' The plaintiff's reply to this is—'no. Your claim then was for the rent of one year only: my defence must necessarily have been confined to that one year; and the result could not bind either of us for the future.' This contention raises a very nice point upon the doctrine of estoppel; as to which during the argument I confess that I personally have felt considerable difficulty.

There is no doubt as to what the law is upon the subject of estoppel. The difficulty is, in applying that law to such a case as the present. Each year's rent is in itself a separate and entire cause of action, and if a suit be brought for a year's rent, a judgment obtained in that suit, whatever the defence might be, would seem only to extend to the subject-matter of the suit; and leave the landlord at liberty to bring another suit for the next year's rent, and the tenant at liberty to set up to that suit any defence she thought proper.

But it is said, on the other hand, that in the former suit between the defendant and the plaintiff, the entire question of what ought to be the permanent abatement of rent during the whole period of the lease, was substantially and necessarily tried and determined, and that they are neither of them at liberty to re-open that question. The principle upon which the abatement was made, the value of the land, the measurements, and other circumstances which form the materials upon which the Judge would estimate the amount of the abatement, would be applicable to one year as well as to another, and what was a just and proper abatement for the year 1871 would be an equally just and proper abatement in each succeeding year.

There certainly appears to be great weight in this reasoning, and there is no doubt that substantial justice will be done by adopting it

Even assuming that the judgment in the former suit were not binding between the parties as an actual estoppel, it would afford such cogent evidence between them upon the point, that the Judge in this suit (in the absence of some entirely fresh materials) would be perfectly right in acting upon it; and we cannot doubt, that if we were to send the case back to the Lower Appellate Court with this intimation, the Judge would act upon it, as a matter of course; and the parties would only be put to additional expense to no purpose.

But happily, we are not without authority in this Court to guide us in coming to a conclusion. The cases which were cited in argument by the defendant's pleader—*Mohima Chunder Mozoomdar* vs *Asradha Dassia* (1) and *Rakhal Doss Sing* vs. *Sreemutty Heeramuttee Dosee* (2) seem very much in point; and we think we ought to act upon them. In one of those cases, the suit was brought by a landlord for one year's rent. The answer was, the land is rent-free—and a decree was passed against the landlord upon that ground. Another suit was afterwards brought by the landlord for another year's rent; and it was held, that as between the parties, it had been decided, that the land was rent-free; and that this decision was binding upon them not only for the one year, but for all future years.

In accordance with this, we hold that the question of abatement of rent has been determined in the former suit between these parties not only for one year 1870, but for all future years. The appeal will therefore be dismissed with costs.

(1) 15, B. L. R., 251. (2) 23, W. R., 282.

BOMBAY HIGH COURT.

The 22nd March, 1876.

PRESENT:

Mr. Justice Melvill and Mr. Justice West.

YAMUNABAI* and another (Defendants) *Appellants*,

versus.

NARAYAN MORESHVAR PENDSE (Plaintiff) *Respondent*.

Husband and Wife—Restitution of Conjugal rights—Cruelty.

In a suit by a Hindu husband against his wife for the restitution of conjugal rights, the criterion of legal cruelty, justifying the wife's desertion, is the same in this country as in England, viz., whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is the reasonable apprehension of it.

Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages or injunction, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has by some insult, or ill-treatment, compelled her to leave him.

Semble that a decree for restitution of conjugal rights between Muhammadans or Hindus may be enforced under Section 200 of Act VIII. of 1859.

MELVILL, J —In this case the plaintiff asks that his wife, the first defendant, may be compelled to return to him, and that the second defendant, in whose house she has been living and who has opposed her return, may be ordered to deliver her up.

It has been faintly argued at the bar that a suit for the restitution of conjugal rights will not lie in our Courts, or, at all events, that a decree ordering such restitution cannot be enforced; and, in support of this argument we have been referred to a judgment of Mr. Justice Markby, reported at 14, Beng. L. R., 298. That judgment does not deny, and the decision of the Privy Council in *Moonshee Buzloor Ruheem* vs. *Shumsoonissa Begum* conclusively establishes that such a suit may be maintained. The question of the mode of enforcing the Court's decree is at present premature, and we only allude to it as affecting the question of the admissibility of the suit. If it were admitted that a Court could not enforce its decree, that would be a strong ground for holding that the Court could not entertain the suit. In the case above referred to, the Privy Council has expressed an opinion (which Mr. Justice Markby does not notice) that disobedience to the order of a Court directing the wife to return to cohabitation would seem to fall within the 200th Sec-

* *Vide* 1, Indian Law Reports, Bombay Series, p. 164.

tion of the Civil Procedure Code, and to be enforceable by imprisonment or attachment of property, or both. The Bengal High Court 6, W. R., 105) had previously come to the same conclusion; and in *Ardasar Jehanghir Framji* vs. *Arabai* (9, Bom. H. C. Rep., 290) I have treated the question as settled by authority. We see no reason to entertain any doubt on the subject now. We are unable to agree with Mr. Justice Markby that a decree, which orders a wife to return to her husband's protection, amounts to nothing more than a declaration that the relation of husband and wife exists between the parties. In nine cases out of ten there is no dispute as to the existence of that relation; and a declaratory decree to that effect is not what the plaintiff asks, nor what the Court professes to give him. The policy of entertaining and enforcing such claims may be open to question; but, so long as their jurisdiction is not barred by legislation, our Courts have no discretion in the matter. In the case of Parsis the Legislature has, by Act XV. of 1865, made express provision for such suits and for the enforcement of the decree (section 36); and the cases to which we have referred are, we think, sufficient authority to support the action of our Courts in similar suits between Hindus and Muhammadans.

The question which we have to decide, as between the plaintiff and his wife, is whether the latter has proved a legal justification for the admitted refusal to return to her husband's house.

* * * * * * * * * * * * *

The plaintiff, as the Assistant Judge says, is admittedly a man of very low mental capacity, on the border line of idiocy. But Yamunabai has not alleged that she entertains any apprehensions to her safety on this account, nor indeed that she is unwilling to live with her husband on this account. On the contrary, on the same day on which the present suit was filed, she filed a counter-suit to obtain possession of her husband, alleging that he was of unsound mind, and that she was the proper person to have charge of him, but that his cousin, Ramchundra, refused to give him up. Her objection was not to living with her husband, but with her husband's relatives. Now it is easy to conceive that the annoyances of married life must be often much aggravated by the necessity which a Hindu wife is under of living in the same house with the whole of her husband's family; and ill-treatment at the hands of her husband's relations, from which he was powerless to protect her, might reasonably be urged as a ground for refusing to live with him. But no such ill-treatment has been alleged in the defendant's written

statement. It has, indeed, been suggested to us by the learned counsel for the special appellants that that statement implies much more than it expresses; that the first defendant left her husband's house in consequence of an attempt made upon her virtue by her husband's cousin Krishnaji; and we are asked to order the examination of certain witnesses, whose evidence, it is said, would establish this fact. Undoubtedly no Court would order a wife to return to her husband's house if she were liable to be exposed to an outrage of this description But it is impossible to pay any attention to a mere verbal allegation made at this late period of the proceedings. If the defendant had so good a defence, she should have made it distinctly. and have raised an issue regarding it. She should, at least, have come forward to give evidence. She was summoned as a witness, and her pleader twice obtained an adjournment in order to produce her. But she remained absent, and her absence has never been accounted for. It is out of the question that the Court should now order an enquiry into the truth of an allegation which does not even appear on any part of the record. and which the person making it does not venture to substantiate upon oath.

There is one circumstance in this case, and one only, which raises any doubt as to the right of the plaintiff to the relief which he seeks. Soon after this suit was instituted, the plaintiff lodged a complaint before the Magistrate, charging the second defendant with having committed adultery with the first defendant. He swore that he had himself witnessed circumstances leading to the conclusion that adultery had taken place. He was disbelieved, and his complaint was rejected without enquiry. He then brought the matter before the higher Courts, but without success. In the present suit he has again put forward this charge of adultery, and has called his relations to support it. The Assistant Judge has found that the imputation is utterly groundless. We must take it, then, that the plaintiff and his relations, in their endeavor to gratify their hatred against the second defendant, have not hesitated to asperse the character of the plaintiff's wife. In his deposition before the Magistrate the plaintiff used a very opprobrious expression in reference to his wife, and when pressed with his inconsistency in wishing to recover possession of a wife whom he held in such low esteem, he said that, if she returned to him, it would be inconsistent with his religion to receive food and water from her hands, though in other respects he should treat her with the affection due from a husband to a wife. It has been much pressed upon us that the unjust aspersions cast

by the plaintiff on his wife amount to cruelty, and that the treatment to which he has himself said that he intends to subject her, would also amount to cruelty, and that on these grounds the defendant should not be compelled to return to his house.

In *Moonshee Buzloor Ruheem* vs. *Shumsoonissa Begum* their Lordships of the Privy Council say:—" It seems to them clear that, if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court." In the present case we are only concerned with the question of cruelty; and on that point their Lordships, in another part of the same judgment, say: —" The Mahomedan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following: 'There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it.' 'The Court,' as Lord Stowell said in *E ans,* vs. *Evans* 'has never been driven off this ground.'" The recent case, to which the Privy Council refer, was no doubt the case of *Milford* vs. *Milford*. A number of earlier cases have been quoted to us as showing that to constitute legal cruelty, it is not necessary that there should be actual violence; and, no doubt, some of those cases do indicate a desire on the part of the English Judges to enlarge the definition of cruelty, so as to embrace certain cases of peculiar hardship. But the authority of the later cases is conclusive as to the present state of the English law. In *Milford* vs. *Milford* the Judge Ordinary took time to consider his judgment, observing:—" The question of cruelty, requires a very critical examination. It is just one of those cases in which the Court is bound to take care that it is not induced, by the desire of giving full relief to the wife, to trespass beyond the limits assigned by the law to the definition of legal cruelty." And afterwards, in delivering judgment, he said:—" The essential features of cruelty are familiar. There must be actual violence of such a character as to endanger personal health or safety, or there must be the reasonable apprehension of it. The Court, as Lord Stowell once said, has never been driven off this ground. Nor to the cases cited in the argument, whatever general expressions may have fallen from

the Court, affect to decide that any thing short of this will be sufficient to found a decree upon cruelty. The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread." In the still more recent case of *Kelly* vs. *Kelly* the Judges stated the law in similar terms, and granted a judicial separation on the ground that, if force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health, and render a serious malady imminent, although there be no actual physical violence such as would justify a decree, it amounts to legal cruelty. In that case, then, the Judges were careful to keep within the limits laid down in previous cases. The question for us to decide is whether, in this country, we ought to extend those limits, and to enlarge the definition of legal cruelty so as to allow a wife to justify her desertion of her husband upon grounds which in England would not amount to a justification. After a careful consideration of this question we have come to the conclusion that we ought not to do so. Native law and custom is, at least, as stringent as English law in regard to the duty of a wife to live with her husband. As the Judicial Committee say of the Mahomedan law, so we would say of the Hindu law, that, on a question of what is legal cruelty between man and wife, it would probably not differ materially from our own. Any difference there might be, would be in the direction of greater strictness, not of greater laxity,—at least in regard to the treatment of the wife by the husband. A Hindu wife cannot, any more than an English wife, claim a divorce on account of merely her husband's inconstancy; but she may demand a separate maintenance if her husband ill-treat her on account of a favorite wife or mistress. She may abandon a husband who communicates anything noxious. In the case of any undue chastisement, in the exercise of marital rights, our Courts would probably adopt the views expressed by Sir Thomas Strange, though in the Presidency towns they might possibly be somewhat hampered by the provisions of 21, Geo. III., C. 70, S. 18, and 37, Geo. III., C. 142, S. 12. But we do not think that we should be justified under Hindu law, any more than under English law, in holding that an unfounded imputation upon a wife's chastity, however gross an outrage, is by itself sufficient to constitute legal cruelty. An American writer refers to an old case in Scotland where a husband publicly and perseveringly reproached his wife falsely with lascivious behaviour and immoderate lust, and in which the Commissaries of the Court of Ses-

sion held this a sufficient ground for a judicial separation ; but the House of Lords reversed the decision. The observations of this writer on this subject are worth quoting. " The proposition," he says, " seems to be, on the whole, well established in England and in most of our States, that the harm to be apprehended must be bodily harm, in distinction from mental suffering. For, while it is admitted that pain of mind may be even more severe than bodily pain, and a husband disposed to evil may create more misery in a sensitive and affectionate wife by a course of conduct addressed only to the mind, than if, in fits of anger, he were to inflict occasional blows upon her person; still it is said that in such a case 'the Court has no scale of sensibilities by which it can gauge the quantum of injury done and felt.' The rule, therefore, seems to have arisen, not from any notion of its inherent justice, but from the difficulty of practically administering the opposite rule, of regarding the mind the same as the body." In this country generally, and particularly in the present case, in which imputations of lascivious behaviour are cast by both sides with equal recklessness, it would certainly be impossible to gauge by any scale of sensibilities the quantum of injury done and felt.

As to the statement of his intentions contained in the plaintiff's deposition before the Magistrate, to which reference has been made, it is sufficient to say that, even if it be regarded as a menace seriously intended, it falls short of a justification of the first defendant's refusal to return to her husband.

It follows that the first defendant has not, in our opinion, proved legal cruelty on the part of her husband or his relations. In a suit between Hindus we consider that the only safe and practical criterion of cruelty is that contained in the definition which guides the English Courts, namely, that there must be actual violence of such a character as to endanger personal health or safety; or there must be the reasonable apprehension of it. In a suit between Muhammadans the Privy Council has expressed its opinion that the same definition is applicable; and in the Parsi Chief Matrimonial Court of Bombay, over which I now preside, a similar definition was adopted at an early period of the Court's existence (*Fardunji* vs. *Kursetji Dinbai*, 23rd November 1869.)

The next question is whether the plaintiff, having established his right to compel his wife to return to his protection, is entitled also to a decree against the second defendant, Narayan Bhide. The law on this subject is correctly stated by the Assistant Judge. Every person who receives a married woman into his house, and suffers her to continue

there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him. The present plaintiff asks, not for damages, but for an injunction; and he is entitled to an injunction if he has proved his case, and if the conduct of the second defendant still continues to show a necessity for it. The Assistant Judge has found that the second defendant did harbour the first defendant after notice from her husband; and, looking to the conduct of the second defendant throughout the proceedings in the suit, we cannot entertain any doubt that he has been, and is, actively, aiding and abetting the first defendant in her opposition to her husband's wishes.

Our decree must be that the plaintiff is entitled to his conjugal rights, and that the first defendant, Yamunabai, be ordered to return to his protection, and that the second defendant, Narayan Bhide, do abstain from harbouring the first defendant, and from offering any obstruction to the return of the first defendant to her husband's protection.

Having regard to the conduct of the parties, and to all the circumstances of the case, we think that each party should bear his and her costs throughout.

We amend the decree of the Court below accordingly.

SHORT NOTES.

PRIVY COUNCIL.

Hindu Law—Mitakshara—Undivided Share of Joint Family Property—Succession—Decree in Suit against Widow—Limitation—Act VIII. of 1859, *s.* 246—*Disability under ss.* 11 *and* 12, *Act XIV. of* 1859 *—Misjoinder—Questions of Law referred to a Full Bench.*

The limitation of one year, provided by s. 246 of Act VIII. 1859, is subject, in the case of a minor, to be modified by ss. 11 and 12 of Act XIV. of 1859. The benefit of these latter sections is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and therefore, during the latter period, it is open to the minor to sue by his guardian.

On the death without issue of a member of a Hindu family joint in estate and subject to the Mitakshara law, his undivided share in the joint family property passes to the surviving members of the joint family and not to his widows, and cannot be made liable for his debts under decrees obtained against his widows as his representatives.

Quære, where a member of a joint Hindu family governed by the Mitakshara law, without the consent of his co-sharers, and in order to raise money on his own account, and not for the benefit of the joint family, mortgages in his life-time his undivided share in a portion of the joint family property, can the other members of the joint family, on his death, recover from the mortgagee the mortgaged share, or any portion of it, without redeeming?

A suit by a surviving member of a joint Hindu family subject to the Mitakshara law, to recover a moiety of the undivided share of a deceased member of the family in the joint family property, ought not to be dismissed on the ground that all the members of the family have not joined in bringing the suit, where it appears that the only other surviving member of the family has already sued for and recovered his moiety of the property, and disclaims all further interest, and is joined as a co-defendant in the suit.

Where a Division Bench of a High Court refers a question of law for the consideration of the Full Bench, and the answer of the Full Bench is not framed as a decree or as an interlocutory order, and an appeal is brought to Her Majesty in Council, it is open to the respondent, without a cross-appeal, to object to the correctness of the answer given by the Full Bench on the question of law referred.

***Vide* 1, Indian Law Reports, Calcutta Series, p. 226, (Appeal from Calcutta High Court). The 15th and 16th December 1875, and 1st February 1876—Phoolbas Koonwar *vs.* Lalla Jogeshur Sahoy.**

CALCUTTA HIGH COURT.

Criminal Procedure Code (Act X. of 1872), *s.* 64—*Power of Judge acting in English Department.*

An application for the transfer of a case under s. 64 of the Criminal Procedure Code should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits or affirmation in the usual way.

***Vide* 1, Indian Law Reports, Calcutta Series, p. 219, (Full Bench). The 23rd March 1876—The Queen *vs.* Zuhiruddin and others.**

BOMBAY HIGH COURT.

Practice—Account—Commissioner's Report—Motion to discharge or vary —Affidavit—Memorandum of objections—Decree—Construction—Notes of judgment in Deputy Registrar's Book.

In moving to discharge or vary the report of the Commissioner for taking accounts, the right practice is to move on a memorandum of objections filed in the Prothonotary's Office, and upon the evidence taken by, and the proceedings before, the Commissioner, and not on affidavits made for the purpose of the motion. In such a motion, affidavits should only be filed (*a*) when ordered by the Court, if it desire fresh evidence; or (*b*) by special leave of the Court for the purpose of advancing a fact which does not appear on the face of the proceedings before the Commissioner.

A note of the judgment of the Court taken by a Deputy Registrar cannot be consulted for the purpose of explaining or aiding in the construction of a decree. Where, therefore, a decree was, on the face of it, an ordinary decree in a partnership suit, for the taking of the accounts between the partners in the usual way, the Court refused to allow the respondent to show, by reference to such a note, that what the decree meant was that he was to be credited and his partners debited with certain payments *in toto*, and not with their respective shares only.

Vide 1, Indian Law Reports, Bombay Series, p. 158, (Westropp, C. J., and Green, J.) The 4th March 1876. Sumar Ahmed and others *vs.* Haji Ismail and Haji Habib.

Award of Compensation—The Code of Criminal Procedure (Act X. of 1872), Section 209—Complainant.

A *karkun* on the establishment of a Civil Court, entrusted with the execution of a writ, reported to the Court that a particular person obstructed him in attaching property as commanded by the writ; and a report was thereupon made by the Court to a Magistrate, with a view to proceedings being taken against the obstructor. The Magistrate acquitted the accused and ordered the *karkun* to pay the accused compensation under Section 209 of the Criminal Procedure Code.

Held that such last-mentioned order was wrong, the *karkun* not being a complainant within the meaning of Section 209 of the Code of Criminal Procedure. In such a case as the above the Subordinate Judge should be regarded as the complainant, and he, having acted judicially,

was not liable to the penalty provided in Section 209 of the Criminal Procedure Code.

Vide 1, Indian Law Reports, Bombay Series, p. 175. (Melvill and West, J.J.) The 23rd March 1876. In re Keshav Lakshman.

BOMBAY HIGH COURT.

The 16th March, 1875.

PRESENT:

Mr. Justice Kemball and Mr. Justice Nanabhai Haridas.

LAKSHMAN RAMCHANDRA* and others (Defendants) *Appellants,*

versus

SARASVATIBAI (Plaintiff) *Respondent.*

Maintenance—Ancestral property—Hindu law—Purchaser bonâ fide and for value.

The maintenance of a Hindu widow is not a charge on any ancestral property in the hands of a *bonâ fide* purchaser from her late husband's successors any more than the payment of unsecured debts due by the family.

The proposition in *Ramchurun Tewaree* v. *Mussamat Jasooda Koonwer* (2, Agra, 134) that the liability of family property, in the hands of a purchaser, for the maintenance of a widow, depends on the ability of her husband's heir to support her, dissented from.

NANABHAI HARIDAS, J. :—The respondent, Sarasvatibai, a Hindu widow, sued her nephew, Mahadev Narayan (not before the Court now), and the two appellants to recover from them Rs. 48 as her maintenance for 1869-70, and to have the same declared a charge, during her life-time, upon certain ancestral property in the hands of the appellants.

The appellants are *bonâ fide* purchasers of that property for valuable consideration, and the only ground on which it is sought to charge them with the maintenance is that they are now in possession of property, which, if it had remained undisposed of in the hands of her nephew, would have been liable for such maintenance.

The plaintiff's husband, according to her own statement, appears to have died about forty years ago, during the life-time of his father. When the plaintiff's father-in-law died does not appear, nor is there anything to show when her brother-in-law, Narayan, died. But it seems that the property of the family, after their death, came into the possession of their sole heir, Mahadev Narayan, her nephew. It

* *Vide* 12, Bom. H. C. Rep., p. 69.

further seems that Mahadev sold a portion of it about seven years ago to the first appellant, who again sold a portion thereof to the second appellant.

What the occasion for the sale to the first appellant was has not been ascertained by the court below, though it appears from the Subordinate Judge's judgment, that the sale was made to pay off " debts," which Mahadev Narayan alleged to have been " contracted for family purposes." Whether such was really the case or not, there is no ground whatever for purposing that it was other than a *bonâ fide* sale for valuable consideration.

Mahadev Narayan, among other defences, which it is not necessary now to refer to, contended that as in a former suit the plaintiff was declared entitled only to Rs. 12, she could not in this suit claim more.

The other defendants, the appellants before us, contended that they were not liable at all, as they were *bonâ fide* purchasers for valuable consideration.

The Subordinate Judge of Alibag, and the Assistant Judge in appeal, awarded the plaintiff's claim with costs, declaring her entitled, during her life-time, to receive annually Rs. 12 from her nephew, and Rs. 36 from the proceeds of the property in the possession of the appellants, *i. e.*, Rs. 18 from each of them.

The question which we have, therefore, to decide in this special appeal is whether, under the above circumstances, the property in the possession of the appellants is at all liable to be charged with the plaintiff's maintenance. This must evidently depend upon what rights Mahadev Narayan and the plaintiff Sarasvatibai respectively had in the property before the sale of it by the former to the first appellant. If the vendor was absolute owner, it is clear the sale conveyed absolute ownership of the property to the vendee, the first appellant. But if that was not the case, it is equally clear that by the sale such right only passed the vendee as was possessed by the vendor.

Upon the findings recorded by the lower courts, we must take it that the property in question was the ancestral property of Sarasvatibai's father-in-law; and such being the case, we must also take it that her husband had, from the time of his birth, a right in that property equal to his father's, which continued to his death, some forty years ago. In virtue of this right, he might have obtained a partition of that property from his father and other co-parceners, in which case, upon his death, Sarasvatibai would have succeeded to his share of it. But he died un-

divided, and, according to the Hindu law applicable to such cases on this side of India, the property vested in those co-parceners, of whom Mahadev Narayan is now the sole survivor. While in his possession as such, he sold it to the first appellant. Unless, therefore, at the time of the sale, she had an interest in the property in the nature of a charge upon it, it would be difficult to hold that it did not pass absolutely to him.

It is contended for the respondent that she had such interest; that her maintenance was a "charge" on the ancestral property; and that, therefore, those who have purchased it, have done so subject to such "charge." In support of this contention, Mr. Bhairavnath has cited to us several authorities, which we shall now examine to see if they establish the proposition contended for.

In *Shidapa* v. *Parsya* (S. A. 433 of 1871), decided on the 18th December 1872, by Sir Charles Sargent and Mr. Justice Melvill, their Lordships had not to decide the question raised here, and they did not decide it. From the judgment recorded in the case, it would appear to have been a suit by a Hindu widow to eject a purchaser of some family property, and her claim was disallowed, their Lordships observing: "The plaintiff can, if so advised, bring another action for maintenance, but in the present suit, as she has failed to establish her claim to the property, we must reverse the decree of the court below, and disallow the claim." In that case, if they have expressed any opinion at all on the subject, it is one which rather doubts the soundness of the proposition now contended for since they remark: "In the present case, the defendant is a stranger, and the property, in respect of which the action is brought, would be liable (*if liable at all*) only under certain circumstances, the existence or non-existence of which cannot be ascertained without raising issues foreign to the contention between the parties, &c."

In the case of *Mussamat Golab Koonver and others* v. *The Collector of Benares and another* there was no question, as in this case, between a widow and a *boná fide* purchaser for value of ancestral property, and it cannot, therefore, be said to have decided the point now raised. It was a case of confiscation by Government under Bengal Regulation XI. of 1796 of the whole property of a joint Hindu family, consisting of the widow and four sons of the last owner, for an offence of which three only of those sons were guilty, the fourth being a minor, and their Lordships of the Privy Council held that the confiscation did not affect the right of the fourth son, or of the widow to her maintenance out of the whole of the ancestral estate. They virtually declared liable to con-

fiscation by Government such portion only of the whole estate as, upon a partition, would have fallen to the share of those three sons; and the widow's right to maintenance would appear to have been tacitly conceded by Government, for the judgment says (p. 258) : " Nothing was urged at the bar against this right."

In *Mussumat Khukroo Misrain* v. *Jhoomuck Lall Dass* (a), the question now raised did not properly arise between the parties, and though there is in the judgment a *dictum* to the effect that the widow " could make the estate chargeable with it into whose hands soever it had fallen under the foreclosure," no authorities are cited in support of the position, and it rather assumes that her claim for maintenance is in the nature of a " lien" on the estate. Besides, this dictum has reference to the contention in argument that as the widow's claim for maintenance was a charge on the estate, therefore she had an interest in keeping the estate in the family; and, moreover, the estate was only declared to be chargeable, if the widow failed in getting her maintenance from the members of her late husband's family.

The case of *Ramchandra Dikshit* v. *Savitribai,* principally relied upon by the Subordinate Judge, and strongly pressed upon our attention by Mr. Bhairavnath, though it might at first sight seem to do so, when it lays down that " By Hindu law the maintenance of a widow is a charge upon the whole estate, and, therefore, upon every part thereof," does not in reality determine the question now before us. Whether her maintenance is such " a charge" or not was not the point the Court was called upon to decide in that case, and we have the authority of the learned Judge himself, whose judgment contains those words, for saying that it did not decide that point; for, when in a later case, the case of *Ramchandra Dikshit* v. *Savitribai,* was cited before him in argument as deciding that " the maintenance of a Hindu widow is a charge," &c., he observed: " The question there was as to whether one brother could be sued alone, and it was held, that he could."

The case of *Shrimati Bhagabati Dasi* v. *Kanailal Mitter* (b) cited by Mr. Bhairavnath in support of his proposition, is in reality more against than for his client. It decides (1st) that " as against one who takes as heir, a Hindu widow has a right to maintenance out of the property in his hands," which, no doubt, is as good law in this Presidency as it is in Bengal, but which does not apply to the present case; (2ndly) that she also has a right to maintenance out of such property in the hands of

(a) 15, Calc. W. Rep., 263, Civ. Rul. (b) 8, Beng. L. R., 224.

any one who takes it with notice of her having set up a claim for maintenance against the heir"—as to the application of which to this case it is sufficient to say that it has never been contended that any such claim had been set up by the plaintiff, or that the appellants had any notice of it when they purchased the property sought to be charged; and (3rdly) that "by the law of Bengal she has no lien on the property for her maintenance against all the world irrespective of such notice."

The case of *Prosonno Coomarsein Mozoomdar* v. *The Revd. B. F. X. Barbosa* (a) does not seem to us to apply to the present case. There "a charge" in the strict sense of the term having been created by will upon an entire estate in favour of the respondent, and a portion of such estate having come into the appellant's possession as purchaser, it was held that the person in whose favour the charge was created was at liberty to proceed against the party in possession of any part of the estate subject to the charge, having such party to recoup himself by contribution from his co-sharers. To apply this decision to the present case, one must assume the very point that is sought to be established, namely, that a Hindu widow's claim to maintenance is "a charge" upon the estate.

The learned authors of the Digest of Hindu Law certainly seem inclined to think that it is such a charge, and that any family property in the hands of a purchaser should, therefore, be regarded as subject to it; but they do not support their opinion by any reasoning or texts or decided cases, to enable one to determine whether it is well founded.

We last come to the cases of *Heera Lall* v. *Mussumat Kousillah* and *Ram Churun Tewaree* v. *Mussumat Jasooda Koonwer* also relied upon for the respondent.

In the first of these cases the facts are not fully set out in the report; but sufficient appears in it to enable one to guess with tolerable certainty what they were. It would seem that the amount of the widow's maintenance had been fixed at "four rupees per month," which must have been done either by a family arrangement or by a decree of the Court; that express mention was made of it in the sale deed, which also stipulated that that sum should be paid by the *vendor*—circumstances pointing to the inference that the parties were dealing with each other upon the basis of that maintenance being actually charged on the property, and that the vendee was anxious to free it from the charge; that the widow was no party to the deed; and that from the moment she came to know of it, she "vigorously opposed the mutation of names."

(a) 6, Calc. W. R. Civ. Rul., 253.

If such were the facts, the general question "whether the widow has an actual lien on the property of her deceased husband, or only a right of action against the heir personally, who takes the property," was by no means necessary to the determination of the case, and the court's answer to it, that "the widow's right is a charge on the property which formed the estate of her husband," stands upon no higher footing than a *dictum*. But if we have not rightly conjectured the facts, the case is certainly a direct authority in support of Mr. Bhairavnath's contention, though it is not very clear why the court, holding as it did, and dismissing the purchaser's appeal, should have ordered that "the decree should be executed first against the heir Madho Singh" (who was not a party to the appeal) "and if he fails to pay it, then against the other defendant," the purchaser. If the widow's right was "a charge," why was she not to be at liberty to realize it out of such property in the first instance, she preferring so to do?

In the other case of *Ram Churun Tewaree* v. *Mussumat Jasooda Koonwer* the doctrine of the widow's maintenance being "a charge" on the estate was sought, but in vain, to be carried to its logical consequence. The respondent, under Section 348 of the Civil Procedure Code, objected that "she should be permitted to enforce her claim against the property purchased by the appellant in the first instance, and not, as the Principal Sadar Amin had decided, after unsuccessfully endeavouring to enforce it" against her husband's heirs and their property. The objection, however, was disallowed, although it had been held that the appellant had purchased the property in execution of a decree in his own favour which the heirs, in collusion with him, had allowed to pass against themselves. This case lays down that property in the hands even of a collusive purchaser is not liable, except under certain circumstances; and that the widow should proceed in the first instance against the heirs and their property. According to this decision, whether a widow's maintenance in a given case is or is not a charge upon family property in the hands of a purchaser, must depend upon whether her husband's heirs are or are not able to support her —a proposition which appears to us to be unsupported by reason or authority. If her maintenance is really "a charge" upon the alienated property, it is not easy to perceive how it can cease to be so by the fact of the heirs having property which may be their own acquisition, nor, if at the time of the alienation the property does not pass to the alienee burdened with any such charge, how one can well be imposed upon it

subsequently, merely because the heirs happen at the time to have no property, which may be the result of their own improvidence.

These authorities, then, do not seem to us to establish that the maintenance of a Hindu widow is a charge on any such property in the hands of a *boná fide* purchaser from her late husband's successors, and one of them at all events is certainly an authority the other way. (*a*)

The texts, which relate to maintenance, occurring in the principal works of authority on this side of India, lay down generally that he who inherits a person's property is bound to maintain those whom that person was himself bound to maintain. But it will be seen, that similar texts also enjoin upon him "the payment of debts" "the *initiation* of the uninitiated as well as "the *marriage* of the unmarried members of the family", and the performance of certain ceremonies for the spiritual benefit of that person, and all these are, in English works on Hindu law, spoken of as "charges on the inheritance" no less than the maintenance of the dependent members of his family. If the latter, therefore, is "a charge" on the inheritance, it is so in no other sense than that in which the former are so.

Now it has been held both in Bengal and here that a creditor cannot follow the assets of a deceased Hindu into the hands of a *boná fide* purchaser for valuable consideration. See *Sunbassapa* v. *Moodkapa, Naroo Huree* v. *Konheir-Munohur*, *Jamiyatram Ramchandra* v. *Parbhudas Hathi,* and *Unnopoorna Dassia* v. *Gunga Narain Paul.* (*b*)

It is indeed laid down in a work of great authority that "debts follow the assets into whosesoever hands they come", but, as observed by Westropp, C. J., in *Jamiyatram Ramchundra* v. *Parbhudas Hathi,* the proposition is "too broadly stated," and is not warranted by the authorities upon which it is based.

If, then, property in the hands of a *boná fide* purchaser cannot be pursued by a creditor of the deceased proprietor, it is difficult to see how the case of a widow, whom he was legally bound to maintain, no less than he was to pay his debts, is to be distinguished. What is there to render such property liable in the one case and not in the other?

Moreover, it is difficult to understand when this "charge on the inheritance" is said to attach to the family property. The duty of maintaining a female legally rests with her husband from the moment of her marriage. No distinction is drawn in the Shastras between wives and widows; if, then, her right to maintenance becomes a charge from

(*a*) 6, Beng. L. R., 225. (*b*) 2, Calc. W. R. Civ. Rul. 296.

the moment of marriage, every alienation made subsequently is subject to such burden—a liability capable of being enforced at any time when the wife or the widow is unable to obtain maintenance from her relatives.

We must, therefore, reverse the decrees of the lower courts so far as they affect the special appellants, or the property in their hands as purchasers. The sum of Rs. 12, which the plaintiff will receive under those decrees from her nephew Mahadev Narayan may not be sufficient for her maintenance; but, inasmuch as she has chosen not to appeal against them, and inasmuch as he, Mahadev Narayan, is not before us, we are unable to inquire into, or order any inquiry into, the sufficiency or suitableness of that allowance; and as the special appellants were improperly made parties to this suit, we think they are entitled to their costs throughout.

BOMBAY HIGH COURT.

The 17th November, 1873.

PRESENT:

Mr. Justice Westropp, *Chief Justice*, and Mr. Justice Pinhey.

GULABCHAND MANIKCHAND* (*Appellant*,)

versus

DHONDI VALAD BHAU (*Respondent.*)

Mortgage—Pendente lite.

The rule *pendente lite nihil innovetur* is in force in British India.

Therefore, where the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale, mortgaged the same house by a registered mortgage to another person, it was held that the last mentioned mortgagee had no title as against the purchaser under a decree for sale in the suit, although such purchaser was the plaintiff in the suit.

A grantee or vendee of the defendant, becoming such during the pendency of the suit, need not to be made a party to the suit, and, inasmuch as the first above-mentioned rule does not rest upon the equitable doctrines as to notice, it is a matter of indifference whether or not, at the time of his becoming grantee or vendee, he had actual notice of the existence of the suit.

WESTROPP, C. J.:—In this case, Sakhu, the widow of Tukaram, and Dhondu, the son of Tukaram, by deed, dated the 10th November 1866, mortgaged a house, for Rs 15, to Gulabchand Manikchand, the defendant in this suit and present special appellant, who instituted, on the 8th July 1869, against those mortgagors and a third party, a suit for

* *Vide* 11, Bom. H. C. Rep., p. 64.

the enforcement of his mortgage, which instrument has never been registered. On the 26th of October 1869, he obtained a decree for the amount due to him, viz., Rs. 30, principal and interest, and Rs. 11 costs, and that decree contained a direction that the house, the subject of the mortgage, should, in default of payment by the mortgagors of the amount decreed, be sold in satisfaction of the sum so found due on the mortgage for principal, interest, and costs. That amount not having been paid, the house was, on the 25th July 1870, sold by the Court, in pursuance of the decree, to Gulabchand Manikchand, who himself became the purchaser, and it is admitted that, as such, he was then put into possession of the house. The present plaintiff and respondent, Dhondi valad Bhau Patil, claims under Exhibit No. 3, which is a mortgage of the same house to him for the sum of Rs. 251, executed by Sakhu and Dhondu Tukaram, on the 26th of July 1869, and registered on the same day. It is admitted that the consideration for that mortgage consisted of an unregistered mortgage bond, dated 3rd May 1868, of the same house for the sum of Rs. 99 (Exhibit 25), and of two ordinary money bonds of the same date, which, in the aggregate, together with the mortgage bond for Rs. 99, amounted to Rs. 216. That sum together with interest amounted to Rs. 251, then said to be due, and it is admitted that no fresh advance or new consideration was given for the registered mortgage bond of the 26th July 1869.

Under these circumstances, the present plaintiff, Dhondi valad Bhau Patil, instituted this suit against Sakhu, Dhondu, and Gulabchand to recover the amount of the registered mortgage (Exhibit No. 3), or to be put into possession of the house.

The defendant, Gulabchand, relied on the priority of his unregistered mortgage of the 10th November 1866, on the decree made in the suit which was instituted by him on that mortgage before the execution of the registered mortgage to the plaintiff, and on his purchase under that decree.

The Subordinate Judge and the Assistant Judge have respectively decreed in favour of the plaintiff; the Assistant Judge saying that both defendant Gulabchand's unregistered mortgage of 1866 and plaintiff's registered mortgage of 1869 were without possession, and that, as regarded the plaintiff's mortgage, its registration cured that defect.

The defendant, Gulabchand, has made a special appeal to this Court, and we do not think that the right view of this case has been taken in the Courts below. Those Courts do not seem to have had suffi-

cient regard to the circumstance that the registered mortgage, on which the plaintiff relies, was executed subsequently to the institution of the suit of Gulabchand, or to have attended to the rule, which prevails as well at law as in equity, as to transactions entered into during the pendency of litigation, or to the kindred provisions of Sec. 223 of the Civil Procedure Code. The plaintiff could not, as against Gulabchand, rely on the unregistered mortgage of the 3rd May 1868 to him, inasmuch as it was puisne in date to the unregistered mortgage of the 10th November 1866 to Gulabchand, and, as to registration, stood in no better position.

The plaintiff's registered mortgage of the 26th July 1869, was executed during the pendency of Gulabchand's suit against the mortgagors, which commenced upon the 8th July 1869, and must, therefore, whether the plaintiff did or did not give valuable consideration for that mortgage, and whether he had or had not, at the time of the execution of that mortgage, any knowledge of the existence of Gulabchand's suit, be regarded as subject to the decree which might be pronounced in that suit. This is so as well in England as in India.

The rule is *pendente lite nihil innovetur.* It is a rule which does not rest on the equitable doctrine as to notice, although in some of the authorities it has been rested upon that doctrine. The better opinion is that it rests upon the inability of the defendant to give, as against the plaintiff, a title during the existence of a suit brought to enforce a specific lien against or purchase of the property. Sir Thomas Plumer, M. R., in *Metcalfe* v. *Pulvertoft* said that "the true interpretation of this rule is, that the conveyance does not vary the rights of the parties in the suit; that it gives no better right, having no effect with reference to any beneficial result against the plaintiff in that suit; and it is very reasonable that the litigating parties should be exempted from the necessity of taking notice of a title, acquired under such circumstances. With regard to them it is as if it had never existed: otherwise suits would be interminable; if one party pending the suit could by conveying to others create a necessity for introducing new parties. The voluntary act, therefore, of the defendant conveying to another, cannot vary the situation or affect the right of the plaintiff." The same views were still more forcibly inculcated in *Bellamy* v. *Sabine* by Lord Cranworth and Lord Justice Turner. In England the rule has, of late, been narrowed by the Stat. 2 Vic, C. 11, which enacts that a *lis pendens,* unless duly registered, shall not affect a purchaser without express no-

tice. There is not any similar enactment in British India. The rule, as it existed in England before the State. 2 Vic., C. 11, prevails here: *Kasim Shaw* v. *Unnodapersaud Chatterji* and 7, Calc. W. R., 225, Civ. Rul.; Calc. W. R. Special Number for 1864, F. B., 40; 7, Mad. H. C. Rep., 104. Sec. 223 of Act VIII of 1859 is founded upon that rule.

It follows hence that, even upon the assumption that the present plaintiff had given valuable consideration for his mortgage of the 26th July 1869, and that he had not any notice either of the defendant Gulabchand's earlier mortgage of the 10th November 1866, or of his suit of the 8th July 1869 to enforce that mortgage, the defendant Gulabchand's title, as purchaser in that suit, must prevail against, and is paramount to, the plaintiff's title as mortgagee. The registration of the plaintiff's mortgage cannot affect the rule that he, who accepts a special lien or purchases from a defendant *pendente lite*, does so subject to the decree which may be made in the suit which is pending.

But we cannot take so favourable a view of the facts of the plaintiff's case as above assumed. It is admitted that there was not any new consideration given by the plaintiff to Sakhu and Dhoudu Tukaram for the registered mortgage of the 26th July 1869, the consideration for which was only the money remaining due, upon the plaintiff's unregistered mortgage of 1868 and the two money bonds, for principal and interest, all of which securities were of later date than that of the unregistered mortgage to Gulabchand. We regard the giving and taking of the registered mortgage as a collusive act on the part of Sakhu, Dhondu Tukaram, and the plaintiff for the purpose of conferring a technical priority upon the plaintiff's claims. We have no doubt that the plaintiff was then well aware of Gulabchand's mortgage and of his suit. The plaintiff will now, we trust, perceive how much a better course it would have been for him to have redeemed the property, as he might have done before the judicial sale to Gulabchand, the prior mortgagee, by payment of the moderate sum of Rs. 41 for principal, interest, and costs, than to have resorted to the illusory and abortive attempt to gain priority over him and so get rid of his claim altogether.

There is a further difficulty in the path of the plaintiff, who has no document on which he has any pretence for relying against Gulabchand except the registered mortgage of the 26th July 1869. It was contended for Gulabchand that the mortgage of 1869, being, on the face of it, for a consideration exceeding Rs. 100, does not fall within Sec. 50 of Act XX. of 1866, which, it is said, provides for the priority only, over

unregistered instruments executed for a consideration less than Rs 100, of registered instruments "of the kinds" mentioned in Cls. 1, 2, and 3 of Sec 18 of the same Act, which are inapplicable to a registered mortgage executed for a consideration exceeding Rs 100 It is unnecessary, however, for us to deal with that question, as we are satisfied with the sufficiency of the first ground, which we have mentioned, viz, that the plaintiff, having taken his mortgage of 1869 during the pendency of Gulabchand's suit against Sabku and Dhondu Tukaram, did so subject to the decree which might be made in that suit, and therefore that the sale under that decree to Gulabchand is completely valid against the plaintiff We, accordingly, reverse the decrees of the Subordinate Judge and of the Assistant Judge, and direct the plaintiff (special respondent) Dhonau valad Bhau Patil to pay the costs of the suit and of both appeals.

HIGH COURT, N. W. P.

The 21st April, 1876.

PRESENT

Sir Robert Stuart, *Kt Chief Justice*

QUEEN* *vs* JAGAT MAL.

Act X of 1872 ss 468, 471, 473—Offence against Public Justice—Offence in Contempt of Court—Prosecution—Procedure.

An offence against public justice is not an offence in contempt of Court within the meaning of s 473 Act X of 1872

The Court, Civil or Criminal which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss 467 468 469, Act X of 1872 is not precluded by the provisions of s 471 from trying the accused person itself for the offence charged

STUART, C. J —This is an application for revision of the order of the Judge of Farukhabad made in an appeal to him by Ram Gholam, Gula Mal, and Jagat Mal These three persons were, along with others, tried and convicted by Mr C W. Watts Joint Magistrate of Farukhabad, of false swearing, under s 193, Indian Penal Code, and respectively sentenced by that officer to two years' rigorous imprisonment

The circumstances out of which the case arose are these—In January last three men, Kanhaiya, Bishan, and Lalman were prosecuted and convicted by the Judge on a charge of grievous hurt, under s. 326, Indian Penal Code. After convicting and sentencing them, the Judge di-

---

* *Vide* 1, Indian Law Reports, Allahabad Series, p 162.

rected that ten of the witnesses who had been examined in the case before him, including Ram Gholam and Gula Mal, should be tried by the Magistrate of the District on a charge of giving false evidence. On receipt of the Judge's order, Mr. Harrison, the Magistrate, transferred the case to Mr. Watts, the Joint Magistrate, who had made the commitment in the grievous hurt case to the Sessions Court. In the course of his investigation for that commitment Jagat Mal had been examined as a witness, and had then, in Mr. Watts' opinion, given false evidence, and Mr. Watts, having represented this state of things to the Magistrate, received sanction for Jagat Mal being included in the proceedings directed by the Judge under s 193 Mr. Watts having concluded the inquiry committed the whole eleven accused for trial before himself, and convicted Ram Gholam, Gula Mal, and Jagat Mal, and another (deferring judgment as regards the remaining seven). There was an appeal to the Judge, but the result was its dismissal by him

Ram Gholam, Gula Mal, and Jagat Mal now apply to this Court in revision, urging that Mr Watts had no jurisdiction to try and convict them, because, according to the terms of s. 471 of the Criminal Procedure Code, he should have sent the case to another competent Magistrate. This, however, is a clearly mistaken view of the law, Mr. Watts being fully competent for all he did. The only case where a Criminal Court cannot itself try is that described in s 473, which relates exclusively to contempts of Court. Here the charge was not for a contempt, but under s 193 for false swearing The conviction and sentence in the case of the three applicants are approved and confirmed, and their application to this Court is refused.

CALCUTTA HIGH COURT.

The 2nd March, 1876.

PRESENT:

Mr Justice L S Jackson and Mr Justice McDonell

HURRYMOHUN SHAHA * (Defendant) *Appellant,*

versus

SHONATUN SHAHA (Plaintiff) *Respondent.*

Hindu Law—Inheritance—Stridhan.

With respect to property given to a woman after her marriage by her husband's father's sister's son, the brother mother and father are preferable heirs to the husband

* *Vide* 1, Indian Law, Reports, Calcutta Series p 275

JACKSON, J.—The question which we have been called upon to consider in this special appeal is whether the plaintiff has any right to maintain the present suit as the right heir, under the Hindu law, to the property which is claimed in this suit. That property was given to the deceased wife of the plaintiff after their marriage and during the continuance of the marriage state by the husband's father's sister's son. It is admitted that this property was the stridhan of the deceased wife, and that the plaintiff claims it as being preferable heir to such property on her decease. This was a matter objected to by the defendant in his written statement.

* * * * * * * * * * * * *

I think we are bound to decide the case entirely upon the authority of the Dayabhaga, and if we can satisfy ourselves as to the meaning of the author of the Dayabhaga on this question, it will be unnecessary to go to any inferior authority. But we have the express authority of Jimuta Vahana himself. In Chap. IV., Sec. iii., the question of succession to the separate property of a childless woman is fully discussed, and we find that the author, after propounding the text of Yajnyavalkya in the second verse of that section, goes on, and in the fourth verse, says :—"It is not right to interpret the text as signifying that any property of whatever amount which belongs to a woman married by any of those ceremonies termed Brahma, &c , whether received by her before or after her nuptials, devolves wholly on her husband by her demise ;" he goes on to give reasons for that, and then we find it stated in the 10th verse of the same chapter and the same section ; "But wealth received by a woman after her marriage, from the family of her father, of her mother, or of her husband, goes to her brothers (not to her husband), as Yajnyavalkya declares, that which has been given to her by her kindred, as well as her fee or gratuity, and anything bestowed after marriage, her kinsmen take, if she die without issue :" and after the brother there is no doubt, that, where the husband does not first take, the mother and the father come in between. The husband, therefore, in such a case would not be the heir, if the text applies, until after brother, mother, and father. The question is whether the text applies to this case. It seems to me that it very clearly does. The property in dispute is undoubtedly wealth received by a woman after her marriage, and it was received, not from the family of her father, or of her mother, but from the family of her husband. That the expression "family of her husband," includes the degree of kindred in which the donor of this

property stood to the deceased woman I have no doubt. The question was raised before us to-day whether such a relation could be properly called *sapinda*. It is not necessary that we should decide that point, but we think that the "family of the husband" is a term wide enough to include this kind of relation, and it appears to us that, if the Subordinate Judge, in deciding this appeal, had looked carefully to the very author to whom he does refer, he would have found ample authority so far as the book* itself goes for not coming to the conclusion that he arrives at. He appears to have referred to text 473, which is at page 722 of the second edition of the book; but if he had referred to the preceding texts, 470 and 471, he would have found what we now decide set out very fully, and moreover in the table of succession set out at page 733 we find that the order of succession to property given by the parents before marriage or *bestowed after marriage*, is, first the brother, second the mother, third the father, and fourth the husband. Pages 712 and 720 are here referred to us, showing what was meant by the words "bestowed after marriage," and the explanation is given under the third branch of vyavastha 470, which says:—"Wealth received by a woman after her marriage, from the family of her father or mother or of her husband, goes to her brothers." A great deal has been sought to be made of the language of the Dayakrama Sangraha and Dayatattwa upon this point, but it seems to us that the contention so raised is based entirely upon the very concise language used in some places by the authors of those two books who, when they mean to designate a particular class of persons, use the person who heads the class to designate the whole. We are reminded by Baboo Mohinee Mohun Roy, who argued this case for the appellant, of the careful explanation given of this very matter by my late colleague, Dwarkanath Mitter, J., in the very able judgment which he delivered in the case of *Judoonath Sircar vs. Bussunt Coomar Roy Chowdry*, (11., B. L. R., 286), a judgment to which I was a party, and in which I at the time entirely concurred. For these reasons we think that in this case the plaintiff is not the next heir, and therefore the Subordinate Judge has come to an erroneous decision on the point of Hindu law involved, and that his judgment must be set aside, and the plaintiff's suit dismissed with costs.

I am bound to say that, as far as we have been able to judge, it seems to us that it is a suit which in every way deserves to be dismissed on the merits. I should observe that the contention that the donor of

* *Vyavastha Darpana.*

this property is not a member of the husband's family involves the contention that he was a stranger, and this is contrary to the admitted fact that the property was stridhun.

CALCUTTA HIGH COURT.

The 28th March, 1876.

PRESENT:

Before Mr Justice Macpherson, Mr Justice Markby, and Mr Justice Morris

MOHESH MISIREE* and another, *Petitioners.*

Criminal Procedure Code (Act X of 1872), ss 291, 295, 296, and 297—Order of Discharge under s 215—Revival of Proceedings.

An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been discharged under s 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*

As the case was one of improper discharge and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that the accused were improperly discharged, might, under s 297, have directed a retrial

In this case one Gopal Mala charged the petitioners with causing hurt to him. The Magistrate who heard the evidence for the prosecution and called upon the petitioners for their defence, having been relieved in his office by another Magistrate, the latter refused to decide the case on the evidence taken before his predecessor, and heard the case *de novo*, but disbelieving the evidence for the prosecution, discharged the petitioners. The prosecutor, thereupon applied to the District Magistrate, praying for a revival of the case, on the ground that all his witnesses were not examined. The District Magistrate ordered the revival of the case, holding that "as the case was one triable under Chapter XVII. of the Criminal Procedure Code, the order for the discharge of the accused persons should not have been passed without hearing all the witnesses for the prosecution," and being also of opinion that no reference to the High Court was necessary, inasmuch as a discharge under s. 215 was not equivalent to an acquittal, and did not bar a fresh enquiry into the same facts. He accordingly directed the Joint Magistrate to proceed afresh with the case against the petitioners under Chapter XVII. of the Criminal Procedure Code. The petitioners ap-

---

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 282.

plied to the High Court to have the order quashed as illegal and made without jurisdiction.

MACPHERSON, J —It seems to us to be clear that this case came before the Magistrate of the 24-Pergunnas under s. 295 of the Criminal Procedure Code, and that it was in the first instance dealt with by the Magistrate under that section. That being so, his proper and only course was to proceed under s 296 to report the case for orders to the High Court, which (under s. 297) might have ordered the accused persons to be tried, if of opinion that they had been improperly discharged.

A case *(re Sidya bin Satya)* quoted by Mr. Prinsep in his latest edition of the Criminal Procedure Code, as having been decided by the Bombay High Court, has been referred to as showing that the Magistrate was right in the course he adopted But that case is not reported in the regular reports of the Bombay High Court: nor have we been able to find any report of it. The full facts with which the Bombay Court had to deal are not before us, and we are unable to say how far the Court may really have gone The note we have of this decision is therefore of little value, and, taking it as it stands, we are not prepared to agree with it as regards cases coming before the Magistrate under s. 295.

Dealing with the matter under ss 294 and 297, we think there is material error in the Magistrate's proceeding, and that his order, directing the Joint Magistrate to entertain the fresh complaint now made and all the subsequent proceedings, ought to be quashed.

Whatever may have led to the various delays which have occurred in the prosecution of this case since the 21st of July 1875, there is no doubt that every great and unfortunate delays have taken place. It is, as a rule, most unfair and undesirable in every way to order an accused person to be tried over and over again for the same offence, unless under very peculiar circumstances. In the present instance there is nothing peculiar in the circumstances to warrant a third trial. and it seems to us wrong and improper (within the meaning of s 294) that an order should be made directing the prosecution to be now recommenced

The order of the 10th of February and all the subsequent proceedings are quashed.

SHORT NOTES.

PRIVY COUNCIL.

Adoption—Suit to set aside—Infant Marriage—Presumption as to Age—Power of Minor to give permission to adopt—Regs. X of 1793, *s.* 33, *and XXVI. of* 1793, *s.* 2*—Minor under Court of Wards—Onus probandi—Estoppel.*

The foundation for infant marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *matura viro,* a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is, that the husband, when called upon to receive his wife for permanent co-habitation, had attained the full age of adolescence and also the age which the law fixes as that of discretion.

According to the Hindu law prevalent in Bengal, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son.

Semble.—The operation of s 33, Reg. X. of 1793, which, read together with s. 2, Reg. XXVI. of 1793, prohibits a landholder under the age of eighteen from making an adoption without the consent of the Court of Wards, is confined to persons who are under the guardianship of the Court of Wards.

Quære, whether a decree in favour of the adoption passed in a suit by a reversioner to set aside an adoption is binding on any reversioner except the plaintiff; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the plaintiff?

Vide 1, Indian Law Reports, Calcutta Series, 289—(Appeal from Calcutta High Court.) The 8th, 9th and 10th February 1876—Jumoona Dassya *vs.* Bamasoonduri Dassya.

CALCUTTA HIGH COURT.

Jurisdiction—Suit for Land— Letters Patent, 1865, *Cl.* 12—*Deed of Trust giving Trustees Power of Sale of Land in the Mofussil—Suit by Creditor to have Trusts carried out.*

M and L were the joint absolute owners of certain land in the Mofussil, M having a 14-anna share, and L the remaining 2-anna share therein. During the absence of L in England, M executed, on behalf of himself and L, a deed of assignment of the whole of the property to trustees, for the benefit of the creditors of the estate, which was heavily encumbered, on trust to sell the land and distribute the assets to the creditors. The trusties accepted the trust, but difficulties afterwards arose in carrying them out. A suit was thereupon instituted by the plaintiff, a creditor, on behalf of himself and the other creditors, the plaint in which alleged that the trustees were desirous of being discharged, and prayed that the trusts might be carried into effect; that the trustees might be removed; and that a Receiver might be appointed to carry out the trusts. To this suit the trustees and M and L were made defendants. L, who was in England, denied any power in M to execute the deed on his behalf, the trustees and M were personally subject to the jurisdiction. *Held per* PHEAR, J., in the Court below, that the plaint disclosed a good cause of action, as the Court, if it had jurisdiction, would have power to make a declaration binding against L as to the validity of the deed of trust, to appoint a Receiver of the estate, and to direct a sale which would be binding on M and L; but that the suit being one "for land" within the meaning of clause 12 of the Letters Patent the Court had no jurisdiction to try it.

Held on appeal that the suit, having for its object to compel a sale of the whole of the land, including L's share the title to which was disputed, was a "suit for land" within the meaning of cl 12 of the Letters Patent, and that the Court had no jurisdiction to try it.

Vide 1, Indian Law Reports, Calcutta Series, p 249—(Sir Richard Garth, Kt, C J, and Pontifex, J.) The 29th and 30th March and 2nd May 1876 The Delhi and London Bank, *vs.* Wordie and others.

Damages, Measure of—Action for Breach of Contract—Collateral Contract.

The defendant entered into a contract with the plaintiffs to purchase from them a quantity of gunny bags, of which the defendant was to take delivery at certain stated times On failure by the defendant

to take delivery, the plaintiffs brought a suit for breach of the contract, estimating the damages at the difference between the contract price and the market prices on the days when the defendant ought to have taken delivery. It was proved that the plaintiffs never had the goods in their possession, but that they could have obtained them under a contract they had with a third person, and it was found that the plaintiffs were ready and willing to deliver them at the time contracted for. The Lower Court held that the measure of damages was the difference between the contract price of the bags, and the amount which it cost the plaintiffs under their collateral contract to procure and deliver them. *Held,* reversing the decision of the Court below, that the proper measure of damages was the difference between the contract price and the market prices at the dates of failure by the defendant to take delivery.

Vide 1, Indian Law Reports, Calcutta Series, p. 264, (Sir Richard Garth, Kt., C. J. and Pontifex, J). The 15th March and 2nd May 1876—Cohen and another *vs.* Cassim Nana.

Criminal Procedure Code (Act X. of 1872), *s.* 272—*Arrest pending Appeal.*

In an appeal under s. 272 of Act X. of 1872, the High Court has power to order the accused to be arrested pending the appeal.

Vide 1, Indian Law Reports, Calcutta Series, p. 281, (Macpherson and Morris, JJ.) The Queen *vs.* Gobin Tewari and another.

Husband and Wife—Married Woman's Property Act (III. of 1874), *ss.* 7 *and* 8—*Succession Act (X. of* 1865), *s.* 4—*Action for Trover—Wife against Husband.*

The plaintiff was, at the time of her marriage in 1870, possessed in her own right of certain articles of household furniture, given to her by her mother. Since January 1875 she had lived separate from her husband, but the furniture remained in his house. In February 1875, her husband mortgaged the property to B, without the plaintiff's knowledge or consent. In June 1875, one KCB, a creditor, obtained a decree against the husband and B, in execution of which he seized the furniture as the property of the husband, and it remained in Court subject to the seizure. In July 1875, the plaintiff instituted a suit in her own name in trover to recover the articles of furniture or their value from her husband, on the ground that they were her separate property, and in August 1875, she preferred a claim in her own name to the property un-

der s. 88 of Act IX. of 1850. It was found on the facts that the furniture was the property of the plaintiff. The husband and wife were persons subject to the provisions of the Succession Act, s. 4, and the Married Woman's Property Act, 1874.

Held that, under s. 7 of the latter Act, the suit was maintainable against the husband.

Held also, that the judgment for the plaintiff in the suit, to recover the furniture or its value from the husband, could not, without satisfaction, have the effect of vesting the property in the husband from the time of the conversion, and therefore the claim under Act IX. of 1850 was also maintainable.

Vide 1, Indian Law Reports, Calcutta Series, p. 285, (Sir Richard Garth, Kt., Chief Justice, and Pontifex, J.) The 16th May 1876—Harris *vs.* Harris—Harris *vs.* Koylas Chunder Bandopadhia.

BOMBAY HIGH COURT.

Hindu Law—Inheritance—Blindness—Disqualification to inherit.

According to the Hindu law, as prevailing in the Bombay Presidency, blindness, to cause exclusion from inheritance, must be congenital.

Therefore where the widow of a childless intestate, though proved to have been totally blind for some years before the death of her husband, was admitted not to have been born bind.

Held that such blindness did not prevent her from her inheriting the property of her husband on his decease.

Vide 1, Indian Law Reports, Bombay Series, 177 (Westropp, C. J., and Sargent, J.) The 25th March 1876—Murarji Gokuldas and others *vs.* Parvatibai.

Pensions Act XXIII. of 1871—"Toda-Gras"—Decree before the date of the Act.

"*Toda-Gras*" *haks* are within the scope of the Pensions Act XXIII. of 1871; and a suit in respect of them cannot be instituted without the certificate required by Section 6 of the Act.

Where a mortgagee of such *haks*, had, before the date on which the Act came into operation, obtained a decree for the recovery of his mortgage debt from the mortgaged *haks* and from the mortgagor personally, and a fresh suit was necessary to enforce execution of that decree against those *haks*,

Held that the Act did not apply to such fresh suit.

Semble that the word "right" in Section 3 of Act XXIII. of 1871 is equivalent to the word *hak* in its restricted sense of "allowance" or "fee."

"*Toda-Gras*" *haks* are thus described by the Judicial Committee of the Privy Council in Maharana Fatesangji *vs* Desai Kallianrayaji (10, Bom. H. C. Rep., 281): "It is sufficient to state that these annual payments, though originally exacted by the *Grasias* from the village communities in certain territories in the west of India by violence and wrong, and in the nature of black-mail, had, when those territories fell under British rule, acquired by long usage a quasi-legal character as customary annual payments; and that as such they were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue."

Vide 1, Indian Law Reports, Bombay Series, p. 203. (Melvill and Kemball, JJ.) The 27th March 1876—Parbhudas Rayaji and another *vs.* Motiram Kalyandas.

Miras—Razinama—Abandonment of miras right—Ejectment.

A *Mirasdar* who has given in a *razinama* is entitled to eject the tenant put in possession of his *miras* lands by the Collector, provided he sue within the period of limitation, and the *razinama* contain no stipulation whereby he expressly abandons his *miras* rights.

Vide 1, Indian Law Reports, Bombay Series, p. 208, (Warden and Gibbs, JJ.) The 6th August 1868—Joti Bhimrav *vs.* Balu Bin Bapuji and another.

Registration—Memorandum—Receipt—Section 17 (*Clauses* 2 *and* 3) *and Section* 49 *of Act XX. of* 1866 *and Act. VIII. of* 1871—*Evidence—Practice—Special Appeal—Point not taken in either of the Lower Courts.*

A document purporting to have been passed by a mortgagee to his mortgagor and reciting the demand of the former for re-payment of his mortgage money before the due date of the mortgage, and the compliance with that demand by the latter by means of a fresh loan upon a second mortgage of the same property; and reciting also the fact of the delivery of possession of the property by the original to the second mortgagee; and purporting, in conclusion, to contain a declaration by the original mortgagee that nothing remained due to him in respect of his mortgage, is a document which, under Clauses 2 and 3 of Section 17 of Act XX. of 1866 as well as under Clauses 2 and 3 of Section 17 of

Act VIII. of 1871, requires registration, and, if unregistered, is by Section 49 of the same two Acts inadmissible as evidence of any transaction affecting any property comprised therein.

The fact of the extinction of the original mortgagee's lien may, however, be proved by other documentary or proper oral evidence.

A pain not taken in either of the Lower Courts was disallowed as being too late when taken for the first time at the hearing of the special appeal.

Vide 1, Indian Law Reports, Bombay Series, p. 197, (Westropp, C. J. and West, J.) The 16th March 1876—Mahadaji *vs.* Vyankaji Govind.

Registration Act VIII. of 1871, *Section* 17, *Clauses* 2 *and* 3 ; *Section* 18, *Clause* 7—*Acknowledgment of receipt of consideration.*

J. T. passed a writing to V., under date the 28th April 1874, stipulating that the deed of sale of J. T.'s bungalow to V., for Rs. 4,300, which was to have been made that day, owing to certain circumstances therein mentioned, should be made and delivered by J. T. to V. 20 days thereafter. The writing further acknowledged the receipt, by J. T. from V., of Rs. 100 as earnest money for the purchase of the bungalow, and concluded with certain penalties in the event of a default by either party. In a suit in the nature of a suit for specific performance, brought by V. to compel J. T. to execute the deed of sale to V., and to register the same as promised in the writing of the 28th April 1874,

Held that the writing required registration under Act VIII. of 1871, Section 17, Clauses 2 and 3, as it distinctly acknowledged the receipt of Rs. 100 as part of the consideration for sale of the house to the plaintiff for the sum of Rs 4,300, and operated to create an interest in the house of the value of Rs. 100 and upwards.

Kedarnath Dutt vs. *Shamlall Khetry* (11, Beng. L., R., 405) distinguished.

Vide 1, Indian Law Reports, Bombay Series, p. 190. (Westropp, C. J., and Melvill, J). The 2nd February 1876—Valaji Isaji *vs.* Thomas.

HIGH COURT, N. W. P.

Act VIII. of 1859, *s.* 354—*Remand—Objection—Procedure.*

Where an Appellate Court, under s. 354, Act VIII. of 1859, refers issues for trial to a lower Court and fixes a time within which, after the

return of the finding, either party to the appeal may file a memorandum of objections to the same, neither party is entitled, without the leave of the Court, to take any objection to the finding, orally or otherwise, after the expiry of the period so fixed without his having filed such memorandum.

Vide 1, Indian Law Reports, Allahabad Series, p. 165. (Full Bench). The 24th April 1876. Ratan Singh *vs.* Wazir.

Hindu Law—Undivided Hindu Family—Ancestral Immoveable Property —Partition.

In an undivided Hindu family the son has, under the Mitakshara, a right to demand in the life-time, and against the will, of his father, the partition and possession of his share in the ancestral immoveable property of the family.

Vide 1, Indian Law Reports, Allahabad Series, p. 159. (Full Bench). The 20th April 1876—Kali Parshad *vs.* Ram Charan.

CALCUTTA HIGH COURT.

The 24th September, 1869.

PRESENT :

Mr. Justice Markby and Mr. Justice E. Jackson.

THE BANK OF BENGAL* *(Plaintiffs,)*

versus

R. CURRIE AND CO. *(Defendants.)*

Act VIII. of 1859, *ss.* 41, 97, 272, 327—*Act XI. of* 1865, *s.* 38—*Act XXI. of* 1863, *s.* 22—*Confession of Judgment by Defendant at the time of filing the Plaint—Discretion of Judge to hear the case then and give a Decree.*

Held that the Judge has a discretion when parties have come to a mutual agreement, or when the defendant has confessed judgment, to decide the suit at once, in accordance with such agreement or confession. He is not bound to do so till the time fixed for the regular hearing of the suit; and he cannot exercise that discretion where there is any doubt as to the good faith or identity of the parties.

An insolvent defendant appeared and confessed judgment at the suit of one of his creditors at the filing of the plaint. There were other

* *Vide* 3, B. L. R. (A. C.) p. 396.

suits filed by other creditors. The Judge (Recorder of Moulmein) gave a decision for the plaintiff, but declined to sign judgment, pending a reference to the High Court, and Act XXI. of 1863, Section 22, on the following questions :

(1) Is the plaintiff entitled to a decree as of the date in which the defendant appeared and confessed judgment?

(2) If he is not so entitled, on what principle are the priorities of the successive plaintiffs to be determined?

JACKSON, J.—(In delivering judgment said :)—As to the first question, taking the facts of this suit to be that, on the presentation of the plaint, the defendant then and there appeared and confessed judgment, I think that the Judge was not obliged at that time to hear the defendant. The Judge was at liberty to follow the ordinary procedure of the Court, and to order that the hearing of the case should be fixed for a certain date, and to decline to hear the defendant until that date arrived. Even if Section 98 applies, as has been suggested, that section lays down that when the parties are agreed in a suit, the decision of the suit shall be passed in accordance with such agreement, but no time is fixed. Even if the agreement is filed on any day antecedent to that fixed for hearing, the Judge is not bound to consider the suit in any way until the date fixed for hearing. Certainly if the Judge entertains any doubts as to the identity of the parties or their good faith, he should not pass an immediate decree, but should take up the suit on the date fixed for its hearing, and then pass what decree is proper.

On the other hand, it seems to me that every Judge has a discretion where parties have come to a mutual agreement, or where the defendant has confessed judgment, to decide the suit at once in accordance with such agreement or confession. It is, in most cases, for the convenience of the parties, as well as of the Court, that such decrees should be passed without delay. But it is obvious that where there is any doubt of the good faith of the parties or of their identity, the Court would not exercise that discretion, but would allow the case to come on at the regular fixed time. In the case now under reference, the learned Recorder gave the plaintiffs a decree on the date on which the defendants confessed judgment. He had a discretion to do so. The decree was a legal decree, and the plaintiffs are entitled to have it dated on the day on which it was passed.

MARKBY, J.—In this case, I think the first question put to us by the learned Recorder ought to be answered in the affirmative.

I think that the defendants having voluntarily appeared in Court, the necessity of serving a summons for appearance was dispensed with; and that the defendants having further admitted the debt, the Court had no other course than at once to give judgment for the plaintiffs, provided of course that it was satisfied of the identity of the defendants, or that the advocate who appeared for them was duly instructed. I agree with the learned Recorder in thinking that no question of fraudulent preference could then be gone into.

At the same time, I fully concur with the learned Recorder in considering the state of the law most unfortunate, which in the case of an insolvent defendant (the only case in which priority is of any importance) permits the selection by him which of his creditors shall be paid in full, or as is generally the case, which shall be paid at all. Indeed the present procedure is easily capable of being abused still further, and as I believe very frequently is so. In many cases the first in the list of attaching creditors is really only a nominal creditor acting on behalf of the defendant. This is the state of the law all over India and in large commercial communities the evils of such a system are specially apparent.

I may mention however that, in my opinion, if by the practice of the Court there are specific rules as to the order in which cases are to be called on, I do not think the Judge is bound to dispose of a case, either when the plaint is filed or at any subsequent time before it is called on in regular course. I do not think the voluntary appearance of the defendant and his willingness to admit the debt make any difference in this respect; and I have found that strict rules as to the order in which cases, both defended and undefended, are to be heard, of some use in preventing the evils to which the Recorder alludes.

I think we should not be justified in answering the other question put by the Recorder, as the parties between whom it will arise are not before us.

LIENS.

A LIEN may be defined a right which one person has to detain the property of another on account of labour expended on that property, or for the general balance of an account due from the owner.

As the common law imposes on certain trades, as innkeepers and carriers, the obligation of accepting all employment offered within the limits of their occupation, so, in return for this obligation, it entitles the party to a particular lien on the property as a remuneration for the expense and trouble incurred in the execution of the purpose for which such property was entrusted. But the general opinion appears to be, that the right of lien is not confined to those trades which are under an obligation to accept employment from all who offer it; but that the remedy by detention extends to every trade exercised for the benefit and advantage of the community.

Attorneys and solicitors have a lien for their costs on the papers of their clients; bankers, upon all securities in the way of trade; brokers, factors, and agents, on the property of their principals in possession, or even in the hands of purchasers; masters of vessels, on their cargoes, for wages or necessary repairs, during the voyage; carriers have a lien for the carriage price; innkeepers on the goods and property of their guests, for their food and lodging, and on their horses, for their keeping and stabling; insurance brokers have a lien for the general balance of their account on the policies effected by them for their principals; lastly, millers, packers, wharfingers, dyers, coach-makers, calico-printers, and others, have all a lien on the goods respectively confided to them in the way of business.

But as the right of lien is admitted for the benefit of trade, it is confined in its operations to trade only. Therefore no lien lies for the pasture of cattle, or the keep of the dog; or where there has been a special agreement to pay a certain sum for workmanship, in which case the owner of the goods on which the labour has been bestowed can only be made *personally* liable.

A right of lien gives no general right to *sell goods*, except where the detention of goods is creative of expense, when the lien is saleable. In case, too, of the lien on cattle, it is admitted that they may be worked as the owner would have worked them; so also a cow may be milked.

Under the following circumstances the right of lien cannot be exercised:—1. If the possession of property has been obtained wrongfully or by misrepresentation. 2. If it has been entrusted solely on the *personal* credit of the owner of the lien, or delivered by an authorized servant or agent. 3. And lastly, no lien can be acquired over property delivered by a bankrupt, or one in contemplation of bankruptcy. It is also material to remark, that if the holder of goods accept a specific security in lieu, or voluntarily part with the possession of the whole, or part of them, he afterwards loses all right of lien upon them.

INDEX.

Court of which decided.	Names of Parties.	Subject of Case.	Pages.
Privy Council	Moung Shoay Att, *vs.* Ko Byaw	Duress—Avoidance of Contract	259
Do.	Bisheswari Debya, *vs.* Govind P. Tewari	Plaint—Cause of action—Benameedar	275
Calcutta High Court.	Nocoor Chander Bose, *vs.* Kally Coomar Ghose	Limitation—Promissory note	243
Do.	Lokenath Ghose, *vs* Jugobundhoo Roy	Lessor out of Possession—Lease granted by him	251
Do.	Khaja Ashanoolah, *vs.* Ramdhone Bhuttachajee	Act VIII (B. C.) of 1869, *s.* 27—Limitation	257
Do.	Porao Chamar, *vs* Sheikh Ismail	Bench of Magistrates—Absence of Chairman	280
Do.	Prem Chand Boral, *vs.* Collector of Calcutta	Land Acquisition Act—Compensation	281
Do.	Bhoyrub Chunder Bandopadhya *vs.* Scudamini Debi	Government Revenue—Auction Purchaser's Liability	285
Do.	Queen, *vs.* Upendronath Doss	Penal Code, *ss.* 292 and 294	288
Do.	Manessur Doss, *vs.* The Collector and Municipal Commissioners of Sarun	Suit to set aside Municipal assessment	312
Madras High Court.	Pasupati Latchmia, *vs.* Pasupati Muthambhatlu	Execution—Limitation	245
Do.	Chokalingapeshana Naicker, *vs.* Achiyar	Declaratory Suits	248
Do.	Sayud Chunda Miah *vs.* Lukshmana Ayyangar	Madras Act VIII of 1865	252
Do.	Zinulabdin Rowten, *vs.* Vijien [illegible]	Madras Act VIII of 1865,—Landholder	256
Do.	Sinu Thiruvengadathiengar, *vs* Sangiveerappa	Declaratory Decree	300
Bombay High Court.	Chova Kara, *vs.* Isa Bin Khalifa	Written statement—Variance with evidence	246
Do.	Reg. *vs* Shivya and others	Confession—Certificate S. 122 and 346 of Act X of 1872	253

INDEX.

Court by which decided.	Names of Parties.	Subject of Case.	Pages.
Bombay High Court.	Dayal Jairaj, *vs.* Jivraj Ratansi	Equitable mortgage—Vendor and Purchaser	305
Do.	Manick Lal Atmaram, *vs.* Manchershe Dinsha...	Suit to set aside the act of former trustee—Validity of certain alienations by trustee	321
N. W. P. High Court.	Queen, *vs.* Gur Baksh ...	Act X of 1872, *ss.* 467, 468, 469 and 471 ...	250
Do.	Ram Autar, *vs.* Ajudhia Singh	Execution—Limitation	303
High Court N. W. P.	Akha Ram, *vs.* Nand Kishore.	Act XX of 1876, *s.* 53 money—decree ...	314

MEMORANDUM OF PRACTICE*

IN

TRIALS OF CIVIL SUITS.

BEFORE TRIAL.

Presentation of plaint.

1. When a plaint is presented, the judicial officer, who receives it, should carefully peruse it, and satisfy himself that it exhibits a clear and distinct cause of action. He should also see that there is no misjoinder of plaintiffs.

It should appear in the plaint that the persons, if more than one, who sue together as plaintiffs, *all* jointly as a whole and not some of them only, have the right, which it is the object of the suit to vindicate. If all the persons jointly entitled to the right which, according to the plaint has been infringed, cannot be got to sue together, this fact should be stated in the plaint, together with the grounds of refusal, if known, and those who refuse to sue should be made parties defendant. But the plaint should distinguish the defendants, against whom relief is sought, from the others, and should specify the nature of the relief sought against each of the former, when it is not the same against all.

Again, it should appear in the plaint that the cause of action, of which the plaintiff complains, is attributable in a greater or less degree to *all* the defendants against whom relief is asked, or to those whom they represent. If the cause for suing one defendant is essentially different from that for suing another, the plaint is bad for multifariousness and should be returned to the plaintiff for amendment.

The written statement of the plaintiff ought not to be made a part of the plaint.

Addition of parties.

2. No other persons than those whom the plaintiff has chosen to sue can be added as parties to the suit, except by the action of the Court under the provisions of section 73, Civil Procedure Code. And the power which is given to the Court by this section can only be exercised

* Being Calcutta High Court Circular Order (Civil) No. 12, dated 3rd August 1876.

at a hearing of the suit, and then only when it appears from the disclosed merits of the case that, if the suit be allowed to go on as it stands, the interests of persons, who are not before the Court, in the matter of the suit will be likely to be affected by the result.

This power should be exercised very sparingly, because, as a general rule, an actually existing right of any one in property cannot be affected by a decree passed in a suit to which he is not a party.

Suits for partition, declaration of right in order to a *butwara,* contribution, redemption, foreclosure, administration of property, dissolution and winding up of partnership, and the like, cannot be properly disposed of unless all persons interested in the matter are before the Court; and the principal object of section 73 is to enable the Court to add necessary parties in such suits as these, when it discovers that any have been omitted by the plaintiff. It does not, however, empower the Court to admit intervenors, on their own application, as is so often done in ordinary suits, without the necessity for their presence being *primâ facie* established.

Issues.

3. When a case comes on for the framing of issues, the Court should again look closely at the plaint and written statement of the plaintiff, and separate from the general story such of the allegations made therein as are essential to the plaintiff's cause of action: these will generally be found very few in number; then the Court should look at the defendant's written statement, and see which of these allegations are not therein admitted by implication or otherwise. The material allegations in the plaint which appear to be denied by the defendant or not to be admitted, put interrogatively, are the issues of fact upon which the plaintiff's case turns.

Next, the Court should look at the defendant's written statement for such substantial allegations, if any there be, as serve to change the character of the plaintiff's case, without actually denying it, and so to annihilate his cause of action. These allegations, put interrogatively, are issues upon which the defence turns in the event of the plaintiff's case being in effect made out.

If the allegations in the written statements be in general terms, the Court should be careful to ascertain with precision what the parties are at issue upon, either by examination of the parties, their pleaders, or some person deputed to give information, or by requiring

an amended written statement. The issues ought to state the questions in dispute with precision, and such precision can only be attained by enforcing precision in the written statements of the parties

The two sets of issues, thus arrived at, are the cardinal issues of the suit, and each of them is quite single, never alternative. Besides these issues, subordinate questions of fact may also sometimes be conveniently stated.

If there are more defendants than one, the Court should note against each issue the defendant or defendants between whom and the plaintiff the issue arises

Multifariousness

On this being done, the Court cannot fail to perceive multifariousness in a plaint, if it exists there notwithstanding the scrutiny made at the presentation. And in the event of serious multifariousness being discovered at this stage, the Court should require the plaintiff to elect which cause of action he will proceed to trial upon, and should direct the remainder of the plaint to be withdrawn.

4. What is, or what is not multifariousness, such as ought thus to vitiate a suit, is mainly a question of convenience The test is furnished by the rule that one defendant ought not to be made to answer a plaint, which contains distinct and separate matters relating to other defendants with whom he has no concern.

Framing issues

5. On the occasion of framing issues, the Court should hear all the parties to the suit, and it may conveniently require them to prepare in writing a note of the issues which they think necessary for the proper trial of the matter in dispute between them; after the Court has settled and recorded the issues it considers necessary, either party may put in, in writing, any rejected issue, and the Court should thereon make a note of its rejection.

The way to a right judgment can only be found by closely considering the plaint and written statement of the plaintiff, and by extracting from them the precise character of the plaintiff's right of suit. And in most cases the difficulty of the trial has been overcome when the right issues have been accurately framed.

On the other hand, an issue in the form so often seen of a group of entangled questions is no issue at all, and is productive of nothing but mischief at the trial, and a double or alternative issue generally

indicates that the Court does not see clearly on which side or in what manner the true issue arises. An issue in general terms such as, "Is the plaintiff entitled to a decree?" is meaningless, and should be avoided.

Notice of day of trial.

6. Notice of the day of trial, reasonably sufficient to enable the parties to attend with their witnesses, should be given beforehand. It is the business of the parties respectively to have all their witnesses present in Court on that day. The Court must, on application, issue the requisite summonses for them without delay.

Adjournment.

7. The day of trial, thus announced, must not be changed except for grave cause; and when it is changed otherwise than with the consent of all parties, reasonable notice of the change should be given, as in the first instance.

It is not a sufficient cause for adjournment that a witness desired by any party is not in attendance, unless the Court is also satisfied on evidence, properly taken and recorded as evidence in the suit, that the absent witness is material, and that the party calling him has done all that is reasonably within his power to ensure his attendance, in which case, if the Court be of opinion that a failure of justice will result unless an adjournment be granted, it may allow such adjournment, after hearing the witnesses which are present; but the Court should in every instance at the time of granting such adjournment record its reasons for so doing, and make an order as to the costs thereof.

Proof of service of process.

8. Whenever it is necessary, previously to entering upon the trial (as under section 113, Civil Procedure Code), or at any other time, for the Court to satisfy itself that a summons or other process has been duly served, the judicial officer should for that purpose take the evidence of the serving officer and of the person who accompanied him to identify the person to be served; and the judicial officer should especially bear in mind that the fixing of a copy of summons on the door of the dwelling-house does not constitute effective service* under section 55, Civil Procedure Code, unless reasonable efforts have first been made without success to serve the defendant personally, and

* *Vide* II. Legal Companion, Civil Rulings, p. 77, Khudoorun Lall *vs.* Chutterdharee Lall, 6th February 1874, (C H)

unless, moreover, the defendant is actually dwelling in the house at the time. These conditions must, therefore, be established by the evidence before the judicial officer can be rightly satisfied that service has been duly effected. If the person to be served is elsewhere than at the house pointed out, the serving officer must either seek him out, or return the process under section 57, Civil Procedure Code, but the fact of this service of summons must always be regularly proved before the commencement of a trial *ex-parte.*

THE TRIAL.

Course of trial

9. When the course of the trial has been once entered upon, it should not afterwards be interrupted except for grave cause, but should be continued, from day to day, if necessary, until it is ended.

Postponement

10. Whenever the day for commencing the trial is altered, or whenever the trial after it has been entered upon is postponed, the order for the alteration or the postponement respectively, together with the reason for making it, should be clearly written out on a separate piece of paper and should be dated and signed by the judicial officer who makes it.

Beginning of trial
Proving party

11. The trial should begin by the party on whom the burden of proof lies, and who for the time may be designated the proving party, stating the case which constitutes his cause of action or defence, as the case may be, and giving the substance of the facts which he proposes to establish by his evidence.

The case thus declared ought to reasonably accord with the party's pleadings, *i e.*, plaint, or written statement, because no litigant can be allowed to make at the trial a case materially different from that which he has placed on record, and which his adversary is prepared to meet.*

And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings, and which, if proper issues have been framed, will be found concentrated in them.

---

* *Vide* I, Indian Law Reports, Bombay Series, p 203

12. After stating his case, the proving party should call his witnesses *seriatim*, and by questions, which ought not to be put in a leading form, should elicit from each of them the material facts to which he can speak of his own knowledge. A general request to a witness to tell what he knows, or to state the facts of the case, should, as a rule, not be allowed, because it gives an opening for a prepared story.

Examination of witnesses.

13. The examination of the witness should be effected by the party who calls him, or by his pleader.

The questions should be simple, and so framed as to elicit from the witness, as nearly as may be in chronological order, all the facts relevant to the subject in issue between the parties which he has witnessed, *i.e.*, in any manner directly observed, but on any disputed point they should not be such as to *lead* or suggest the answer; nor such as to induce a witness, other than an expert, to state a conclusion of his reasoning, an inference of fact, or a matter of belief, in the place of describing what he actually observed.

In the like manner, the cross-examination should be effected by the opposite side, only that in this case leading questions may be allowed.*

Then should follow re-examination by the first side for the purpose of enabling the witness to explain answers, which he may have imperfectly given on cross-examination, and to add such further facts as may be suggested and made admissible.

During the course of this examination, cross-examination, and re-examination, the presiding officer ought not† *as a general rule* to interfere, except when necessary for the purpose of causing questions to be put in a clear and proper shape, of checking improper questions, and of making the witness give precise answers. At the end of it, however, if it has been reasonably well conducted, he ought to know pretty nearly the exact position of the witness, with regard to the material facts of the case; and he *should then put any questions to the witness that he thinks necessary.*

The examination of witnesses called by the Court under the provisions of section 171, Act VIII of 1859, and under Section 9,

* *Vide* S. 138 of Act I of 1872, and Legal Companion Vol I, p. 55.

† *Vide* S. 165 of Act I of 1872.

Act XXIII of 1861, should be effected by the Court itself; and after such examination, if the parties to the suit desire it, they should be cross-examined by the said parties. Upon the close of the cross-examination, re-examination of such witnesses, if necessary, should be conducted by the Court, according to the rules of re-examination referred to above.

14. Every document or writing, which a party intends to use as evidence against his opponent, must be formally tendered by him in the course of proving his case. For this purpose it shall be taken from the file of the case if it has been put on it before the trial in pursuance of any enactment of the Civil Procedure Code; otherwise, it must be called for from, and produced by, the person in whose custody it is, the fact of a document being in the possession of a servant or agent of the party on whose behalf it is produced is not of itself a reason for allowing it to be produced after the time prescribed by section 128.

Exhibits

If the opponent does not then object to the document being admitted in evidence, and if the document is not such as is forbidden by the legislature to be used as evidence, the judicial officer shall admit it, and having marked it with a distinguishing mark or letter, by which it should, when necessary, be ever after referred to throughout the trial, should cause it, or so much of it as the parties may desire, to be read aloud.

15. If, however, on the document being tendered, the opposite party objects to its being admitted in evidence, then commonly two questions arise; 1st, whether the document is authentic, in other words, is that which the party tendering it represents it to be; and 2nd, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it. The latter question, in general, is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the judicial officer is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a *primâ facie* case of authenticity, and is further of opinion that the authentic document is evidence admissible against the opposite party, then he should admit the document and have it read, as he would have done under the directions of the last rule had it not been objected to.

Issues as to documents.

But whether the document is admitted or not, it must be marked as soon as any witness makes a statement with regard to it; and if not earlier marked on this account, it must at latest be marked when the Court decides upon admitting it.

Identification of documents.

16. But before a witness is allowed to, in any way, identify a document, he should generally be made by proper questioning to state the grounds of his knowledge with regard to it.

For instance, if he is about to speak to the act of signature, as just above supposed, he should first be made to explain concisely the occurrences which led to his being present on the occasion of the signing: and if he is about to recognize a signature on the strength of his knowledge of the supposed signer's handwriting, he should *first* be made to state the mode in which this knowledge was acquired. This should be done by the party who is seeking to prove the document: and the opposite party, if he desires to do so, should be allowed to interpose with cross-examination on this point before the document is shewn to the witness.

And it is the duty of the Court, in the event of a witness professing to recognize or identify writing, always to take care that his capacity to do so is thus tested, unless the opposite party admits it. And if on the examination effected for this purpose, it appears that the witness was not in fact present at the time of signing, or is not reasonably competent to identify the handwriting, then the judicial officer ought not to receive his testimony on the matter of the signature.

Signature by the pen of another.

17. The signature of one person, which purports, or which appears by the evidence, to have been written by the pen of another is not proved until both the fact of the writing and the authority of the writer to write the name on the document is proved.*

And in the case of the signature of a *pardanisheen*, evidence must also be given of her identity with the signer, before proof of the signature can be considered sufficient to justify the admission of that document in evidence.†

* Where the name of a testatrix was written by A, and the testatrix then, in his presence, affixed her mark, and A in his presence wrote beneath it, "by the pen of A," the attestation was held to be sufficient. *Vide* I, Indian Law Reports, Calcutta Series, page 150.

† *Vide* 10. B. L. R, p. 205

In the case of an illiterate person, who cannot read, it should be proved that he understood the contents of the document.

18. With respect to the provisions of law which relate to the production and proof of old documents, the Court ought to satisfy itself by every reasonable means that the document not only comes from, but has since its inception continued in, the proper custody.

19. Whenever copies may by law be received, it must be remembered that the circumstances which make the copy admissible instead of the original are quite distinct from those which make the document (original or copy) relevant to the issue as admissible in evidence as against the opposite party

Opposing parties

20. When according to the foregoing directions, the party upon whom the burden of proof first lay, has stated his case, and the witnesses adduced by him have been examined, cross examined, and re examined, and all the documents tendered by him have been either received in evidence or refused, then it devolves upon each of the opposing parties who have distinct cases to state their respective cases in succession, and when all of them have done this, then the evidence, whether oral or documentary, adduced by each in order, should be dealt with precisely as in the case of the first party And on its termination, the first party should be allowed to comment in reply upon his opponent's evidence

Foreign matter Additional evidence

21. If, however, the case of an opposing party is such as to introduce into the trial matter which is foreign to, and outside the case of the first party and the evidence given by him, then the latter must be allowed, if he so desires, to rebut this by additional evidence, and his opponent must be allowed to speak upon it by way of reply, before the first party himself makes his own reply, as just mentioned, but this is not to be understood as entitling the first party to ask for an adjournment for that purpose He is bound, unless the Court sees good reason to the contrary, to be prepared with such rebutting evidence.

Recall of witnesses

22. The judicial officer, who presides at any trial, has discretion to recall any witness of any party for further examination or cross-examination, whenever he thinks it necessary for the ends of justice to do so, but the before-mentioned order ought not to be departed from without good reason

When any departure from this order is thus necessary, the judicial officer should record the reason for it in the form of a written note.

The practice of allowing witnesses of either party to be examined indifferently, as they happen to attend, without regard to the order above laid down, is inconvenient and irregular.

Record of another case. Official papers.

23. Whenever it appears to a judicial officer necessary for the ends of justice to exercise the power which is conferred on the Court by section 138 of the Civil Procedure Code, he should record his reason for so thinking in the form of a written note. And all information, which is procured in this manner, should be adduced in open Court before the parties at a hearing, or at an adjourned hearing of the suit, and can only be received and considered by the Court after having been so adduced.

In regard to the exercise of this power on the application of a party, the judicial officer should not send for an original paper or document which that party could procure on his own application, or for any such document as process, pleadings, decrees, orders, or other proceedings in a suit, or any official papers of which that party could procure an officially authenticated copy, unless there is grave cause for so doing or special reason for inspecting the actual document itself.

Filing accounts.

24. When accounts have to be taken in the course of a suit, then it is incumbent on the accounting party, either at the time of filing his written statement, or at some other time before trial of this matter, to be fixed by the Court, to file an account. The Court should then allow reasonable time to the opposing party to examine the account and present a statement of his objections to it. This account must be verified by the oath or affirmation of the accounting party, and each item on the credit side, *i. e.*, each item of disbursement on his part, objected to by the opposing party must be proved by sufficient evidence. And the opposing party has the right to meet this by evidence produced for the purpose of falsifying the account in any particular, or of adding new items to the debit side.

The judicial officer should in such cases first take the evidence adduced in support of the account, then that adduced by the opposing party in the same manner; and should finally on consideration

of the whole determine, *as nearly as possible*, the true state of the account as against the accounting party. The matter of account must, in short, be treated as a separate subject of trial, in a certain sense independent of the rest of the suit.

And it may even sometimes be convenient that the matter of account should be heard and determined at a time specially fixed for the purpose by an adjournment effected when the hearing of the principal issues between the parties, other than that of the account, has come to an end. And when this is so, a time may be appointed for filing the verified account (which is in effect a supplementary written statement) and a subsequent time for the filing of objections thereto by the opposing party. The final hearing of the matter of account should come on at a reasonable interval after this on a day fixed for the purpose.

Local inquiry.

25. Whenever it becomes necessary in the course of a suit that a Commissioner, or Civil Court Amin, should be appointed to make a local inquiry, the judicial officer who makes the order for such inquiry should write the order with his own hand, and shall specify therein—

(*a*) the precise matter of the inquiry, and

(*b*) the reason why the evidence bearing on that matter could not reasonably have been taken in the usual way at the trial in Court;

and the Commissioner's duties should be strictly limited by his *purwanah* to *such matters as* taking accounts and depositions of witnesses, inspecting the land or other subject of dispute, and reporting to the Court, either in the shape of a map, or in writing or both, the existing physical features of the subject inspected, its boundaries and situation relative to other objects, and so on, as the case may be.

The Court has no power to depute to him the determination of any issue between the parties.

The functions of the Commissioner or Amin are limited to procuring evidence and information for the purposes of the trial; and this evidence, including the maps, reports, &c., of the Amin, must be adduced in open Court before the parties, and be subjected to objections and testing according to the foregoing rules, like all other evidence.

26. Immediately on the close of the trial in Court, all documents which may have been filed with the plaint in pursuance of section 39 of the Civil Procedure Code, or been received by the Court in pursuance of sections 128 and 129, *and* which in consequence of not having been tendered in evidence at the trial have not been either placed on the *trial nathi*, or returned to the owners, shall be returned to the parties who filed them or who brought them into Court, as the case may be.

Return of documents

The practice of adjourning a case for argument after all the evidence has been given should as a rule not be allowed * But this observation does not extend to an adjournment when reasonably necessary for a reply on the whole case by the party who is entitled to such reply, nor to an adjournment for argument on a question of law, which may have arisen during the trial and may have been, for convenience sake, reserved for argument until after the taking of the evidence.

27. When the trial in Court is over, the judicial officer should proceed at once, or as soon as possible, to the consideration of his judgment.

Judgment

It is essentially necessary that he should do so, while the demeanour of the witnesses and their individual characteristics are fresh in his memory. He should bear in mind that his first duty is to arrive at a conscientious conclusion as to the true form of those facts of the case about which the parties are not agreed, and that the only means to this end is afforded by the testimony of witnesses. Documents, generally speaking are only valuable as being the utterances of, or representations made by, those who signed them, or gave them or assented to them, and they depend for their value upon the circumstances under which the persons to be affected by their production became parties to or concerned with them. All this can only be made known by oral testimony.

Many documents, too, such as account books, *jamabandi* papers, *khasras*, and so on, are at the best contemporaneous memoranda of the transactions which are entered in them, and have no force in favor of the party on whose side they are made, except so far as they corroborate the direct testimony of witnesses to those transactions;

* *Vide* S 145 of Act VIII. of 1859.

as, for instance, of the cashier to the payment or receipt of the money items in the account, of the *gomastha* to the collections actually made by him according to the *jamabandi*, &c. Also, in the relations between the disputing parties, the facts which constitute the immediate cause of action, *i. e.*, the occurrences which entitle and oblige the plaintiff to bring his suit, and those which immediately preceded them in the order of time, is usually to be found the clue to, and the best test of, the merits of the dispute. These can seldom be obtained otherwise than from the mouths of witnesses. It is, therefore, the duty of the judicial officer throughout the trial to keep a scrutinizing and attentive eye upon each witness as he is being examined, and, above all, to constantly remember that his chief business is to get at the facts through the witnesses. If he deliberately and intelligently directs his attention to this object, he will almost certainly succeed; and the principal facts being ascertained, the right judgment is very rarely matter of doubt.

A note of all orders made by the Court relative to change of parties or bearing upon the course of the hearing of the suit, and a note of all material facts and occurrences which may have happened during the hearing of the suit, must be carefully recorded from time to time, and appended to the record.

AFTER THE TRIAL.

Decretal order.

28. The decretal order which carries the judgment into effect, should be framed by the judicial officer with the most careful attention to its object. It must be precise and definite in its terms; and must specify clearly and distinctly what each party affected by it is ordered to do, or to forbear from doing. Every declaration of right made by it must be concise, yet accurate; every injunction simple and plain.

Signature by pleaders.

29. Every decree should be signed by the pleaders of the parties to the suit, who appeared by pleaders, before it is signed by the judicial officer who passed it; or in the event of any pleader failing so to sign, the cause of the default shall be certified on the decree by that officer.

Wasilat.

30. In cases where *wasilat* is asked for in the plaint, the question as to the amount thereof (if any) which should be paid to the plaintiff in respect to the period of dispossession before and up to the date of filing the plaint,

must be distinctly raised, and if possible determined at the hearing of the suit; and the decree must specify clearly the portion of this amount which each defendant is to pay either severally or jointly with others to the plaintiff. In the event, however, of its being necessary for any good reason to reserve the determination of this question until proceedings are taken to execute the decree, the order to this effect with the reason for making it should be recorded in conformity with the directions of paragraph 27.

It is the duty of the judicial officer to ascertain and determine from the evidence placed before him by both sides what is the amount of *wasilat,* if any, which is due to the plaintiff, and he has no more authority to leave this question to the decision of an Amin than he has to do the same with any other question which arises between the parties in the suit.

An Amin may, when necessary, be sent to effect a local investigation; the reasons for adopting this course should be fully recorded. When an Amin is deputed, his duty is merely to collect evidence for the Court, and to report the state of facts, which he has observed.

In such case the Court must proceed in strict conformity with paragraph 25, and the deposition of witnesses which the Amin may take, and his own report when returned, together with his own testimony, if he be examined, constitute part of the evidence upon which the judicial officer has to decide the question before him, and must be produced to the Court in the presence of the parties at a hearing of the matter in dispute just in the same manner as all other evidence.

Amount due under decree.

31. Whenever on an application for the execution of a decree, or whenever in the course of execution proceedings, it is necessary to ascertain the amount of money which is, or which remains due under the decree, the judicial officer should at the time himself take the record into consideration for this purpose, and therefrom arrive at his own conclusion on the matter.

Application for execution by one or more holders of a decree.

32. When an application is made to a judicial officer under section 207 of the Civil Procedure Code for the execution of a decree by one or more persons, not being all the persons, in whose favor the decree appears to be, he should cause notice thereof to be given to the remaining decree-holders or their representatives, and also to

the person or persons against whom the application is made; and he ought not to grant the application, unless after hearing all these parties, or after giving them an opportunity of being heard, he is satisfied that there is good reason for the application.

In all cases he must treat such an application as an application for execution of the entire decree, so far as it remains unexecuted or unsatisfied.

If the application is for execution of a fraction, or any proportionate part of a decree, he should refuse to entertain it.

— by transferee.

33. When an application for the execution of decree is made under the provisions of section 208 of the Civil Procedure Code by a person claiming to be entitled to the benefit of the decree in consequence of a transfer of the same to him from the original decree-holder, either by assignment or by operation of law, the judicial officer should cause notice of the application to be given to the original decree-holder or his representative, when possible, and also to the person or persons, who appear on the record as judgment-debtors, or against whom the execution is sought; and he ought not to grant the application, unless after hearing all these parties, or after giving them an opportunity of being heard, he is satisfied that the transfer has been in fact effected, and that the persons against whom the execution is sought will not be prejudiced in their rights by the change of decree-holder.

In case he thinks proper to grant the application, he should record his reasons for so doing, and make an order that thenceforward the name of the applicant will stand on the record as decree-holder in the place and stead of that of the decree-holder from whom the transfer may have taken place.

In the case of an assignment by operation of law, the change of decree-holder may always be safely made. But it is otherwise in the case of assignment by private contract. For instance, if at the time when an assignment of the latter kind is made, there exists a cross-decree against the assignor in favor of the person who is his judgment-debtor under the assigned decree, whether the two decrees be decrees of the same Court or not, then the application for the change of decree-holder ought not generally to be granted, without the consent of the judgment-debtor, because the introduction under these circumstances of the assignee in the place of the

assignor might place serious difficulty and embarrassment in the way of the judgment-debtor towards obtaining satisfaction of his own decree.

Scarcely any part of a judicial officer's duty calls for the exercise of more care than the duty of considering applications for execution of decrees made by persons claiming to be entitled thereto under some form of transfer. The granting of these applications, without discrimination, is the source of much mischief and prolonged litigation.

Attachment of judgment debt

34. The attachment of a judgment-debt *i. e.*, of a debt the payment of which is directed by a decree, does not necessarily stay the execution of the decree, though it has the effect of forbidding the debtor from paying the debt immediately to his creditor; but if pending the attachment the debt or any portion of it be realized by execution and brought into Court, it remains there subject to the attachment, and can only be dealt with under section 237 of the Civil Procedure Code

In the event of its becoming necessary in execution of a decree to realize the money interest of the judgment-debtor in another decree, or a judgment-debt due to him under another decree, this must generally be done by the appointment of a manager under section 243 of the Civil Procedure Code to sue out execution of the decree; the attaching Court should never sell the decree, unless there appears to it to be special reason for that course, and in that case the judicial officer ordering the sale is enjoined to embody in his order a written note of that reason

After procedure

35. When, after the attachment of a judgment-debt, the attaching Court either sells the debt or appoints a manager to sue for its realization, the purchaser of the debt in the one case, or the manager in the other, becomes an assignee of the decree within the meaning of section 208 of the Civil Procedure Code, and so entitled to apply for execution of the decree. If he makes such application, it ought to be granted unless the judicial officer to whom the application is made after hearing all parties concerned, or after giving them an opportunity of being heard, is of opinion that, by reason of a prior assignment or for other sufficient cause, the sale or appointment made by the attaching Court failed to pass to the applicant any right to receive the proceeds of the decree when realized.

The questions which present themsleves on applications of this kind generally arise by reason of the attaching Court having attached the judgment-debt as being a debt in fact due to some third person other than the nominal decree-holder The question may even be raised by an objector, who comes in after the application for execution has been granted, and in that case the consideration of it fells rather under section 273 than under section 208 of the Civil Procedure Code.

But, whatever be the occasion of the objection being made, the judicial officer should always give it his most serious attention, because if his decision has the effect of causing the money to be paid to the wrong person, the true owner may be driven to bring a suit against that person for the recovery of it.

Transmission of a decree to another Court

36 When an application is made to a judicial officer requesting him to transmit a decree of his Court to some other Court for execution, he must first satisfy himself that the applicant is entitled to have execution of the decree, and that the decree cannot be executed within the jurisdiction of his Court; then he should prepare a copy of the decree, exclusive of the judgment or any other matter, also a copy of any order which may have been made (as, for instance, under section 208 or under section 216) entitling the applicant to obtain execution of the decree, and also a certificate of the extent to which the decree has, at the date of the certificate, been satisfied, and the date of the last proceeding to enforce or keep the decree in force; these papers, and these alone, he should transmit to the specified Court.

ON APPEAL

Appeal

37. In the event of an appeal being instituted against the decision of the Court of first instance, the *trial nathi* should alone be transmitted to the Appeal Court for the purpose of the appeal, unless other papers be expressly required by the Appeal Court, as provided for in the next following section. When the appeal is based on matter recorded in the *process nathi*, the appellant should give notice to the Appellate Court that the latter will be required.

38. The Appeal Court should hear and determine the matter of appeal between the parties upon those materials only which are in the *trial nathi*, provided that in the event of its being satisfied that the *trial nathi* is in any particular incomplete, it may send to the Lower Court for any paper or deposition which may appear to be wanting, as also for the *process nathi* when required under the last section; and of course nothing in this paragraph must be taken to interfere with the discretion and authority reposed in the Appeal Court by sections 354 and 355 of the Civil Procedure Code.

Materials for trial

39. Every order of the Appeal Court made under the last paragraph or under sections 354 and 355 of the Civil Procedure Code,' shall be made in open Court during the hearing of the appeal, and the reasons for making it shall be then publicly stated. Also a note of the order and the reasons shall be recorded as directed in paragraph 40.

Orders by Appeal Court.

40. In the event of a special (or second) appeal being preferred to the High Court, the Lower Appellate Court should transmit to the High Court the *trial nathi* intact, together with the following papers of its own Court formed into a supplementary *nathi*, namely:—

Special Appeal *nathi*

(*a*) The recorded note of orders and reasons, if any, which is the subject of the last paragraph

(*b*) A note of all orders made by the Appellate Court relative to change of parties, or bearing upon the course of the hearing of the appeal, and a note of all material facts and occurrences which may have happened during the hearing of the appeal.

Notes—Memoranda

(*c*) Depositions, if any, taken by the Appellate Court itself in open Court during the hearing of the appeal, and documents produced before it in pursuance of any such orders.

(*d*) Papers and depositions transmitted to the Appellate Court in consequence of any such orders, and read in open Court during the hearing of the appeal.

(*e*) The judgment of the Appellate Court.

(*f*) The formal decree of the Appellate Court.

MISCELLANEOUS.

Trial and process nathis

41. Due observance of the foregoing directions will, at the termination of the trial in the Court of first instance, have effected a separation of the aggregate papers of the case into two portions, namely :—

(a) The *trial nathi.*

(b) The remaining papers, which will consist solely of processes of Court, petitions with the orders made thereon, affidavits and the like ; and will not comprise any documents belonging to the parties ; and which shall be termed the *process nathi.*

Petitions in execution proceedings

42. Petitions of parties to the decree or their representatives, of the decree-holder or of his assignee, preferred in the course of execution proceedings, issues framed and evidence, whether oral or documentary, taken therein. and the Court's judgment and order passed thereon, must be added to and treated as part of the *trial nathi*, all other petitions and papers in the same proceedings must be added to the *process nathi.*

Note —In all cases of dispute upon any matter to which the above memorandum relates, reference must be made to the Code of Civil Procedure and to decided cases and it is not intended by this memorandum to prohibit the exercise of any discretion or power which the Code confers

---

CALCUTTA HIGH COURT.

The 22nd May 1876

PRESENT

Mr Justice Pontifex

NOCOOR CHUNDER BOSE,*

versus

KALLY COOMAR GHOSE.

Limitation—Act IX of 1871, Sch. II, No. 72—Promissory Note payable on Demand

A suit on a promissory note, payable on demand, dated the 5th August 1869, having been instituted after the 14th November 1875, the alleged date of first demand, was held to be barred by limitation, as no sum either in respect of principal or interest was paid after the 5th August 1869, and if the suit was instituted on the 6th August

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 328.

1872 it must have been dismissed as barred by limitation and the deferring of the suit until after the 1st of April 1873, the date of operation of the Limitation Act of 1871, cannot give the plaintiff any advantage now.

In this case the plaintiff brought a suit on a promissory note payable on demand dated the 5th August 1869, alleging that his cause of action accrued from the 14th November 1875, the first time the money was demanded.

PONTIFEX, J.—(In delivering judgment said):—I was referred to two cases said to be conflicting with one another. One *Parbati Charan Mookerjee* v. *Ramnarayan Matilal* † decided by Macpherson, J., and the other *Brammamayi Dasee* v *Abhai Charan Chowdhy*‡ decided by Norman and Phear, JJ. In each of these cases interest had been paid up to within a short time of the date of suit. And in the second case, Phear, J, expressly held that limitation did not apply, however interest had been paid. "As long," he said, "as the plaintiff forebore to make demand of the principal, and the defendant at the stipulated periods paid the monthly sums by way of interest, so long it was, as it seems to me, impossible in reason to say that the plaintiff had any cause of suit" In my opinion, both of the cases cited are adverse to the plaintiff's claim, and, if additional authority was necessary, I might refer to the case of *Hempammal* v *Hanuman* § In the present case neither principal nor interest has been paid since the 5th of August 1869, and if the plaintiff had instituted his suit on the 6th of August 1872, it must have been dismissed as barred by limitation.

It is impossible for me to hold that he is not barred now because he has deferred the institution of his suit until after the first day of April 1873, the date mentioned in s. 1 of the Limitation Act of 1871.¶

I must, therefore, dimiss the plaintiff's suit, but, as the defendant does not appear, without costs.

† 5 B. L R, 396, ‡ 7 B. L. R, 489

§ 2 Mad. H. C Rep., 472.

¶ See *Vankatachella Mudali* v *Sashagherry Rau*, 7 Mad H. C, 283; *Molakatella Naganna* v, *Pedda Narappa, Id*, 288, *Venkataramanna* v *Manche Reddy, Id.*, 298; and *Chinnasami Iyengar* v *Gopalacharry, Id*, 392, *but see Madhavbhai Shivbhai* v. *Fattesang Nathubhai*, 10 Bom. H. C., 487.

MADRAS HIGH COURT.

The 8th June, 1876

PRESENT

Mr Justice Holloway and Mr Justice Kindersley

PASUPATI LATCHMIA* (*Petitioner,*)

versus

PASUPATI MUTHAMBHATLU (*Counter-petitioner.*)

Execution—Limitation—Adjective Law

In all matters of substantive law the law of limitation in force at the period of the arising of the right, governs. In all cases of adjective law the law of limitation in force at the period of enforcement governs. In some cases questions of substantive law appear in the disguise of questions of adjective law. Execution is a proceeding to enforce a decree of a Court, and comes under the head of purely adjective law. Such being the case, clearly the law prevailing at the time of the application must govern.

In this case it was contended that three years having elapsed from the date of the last application to enforce the decree, the present one was barred.

HOLLOWAY, J.—The point in this case has been frequently decided. The question is whether the suit having been decided while the old Limitation Act was in force has the quality of keeping all proceedings under it within the provisions of the old Limitation Act or of the new Act. The ordinary rule is very plain. In all matters of substantive law, the law of limitation in force at the period of the arising of the right, governs. In all cases of adjective law, the law of limitation in force at the period of enforcement, governs. In some cases questions of substantive law appear in the disguise of questions of adjective law. Execution however is a proceeding to enforce a decree of a Court, and comes under the head of purely adjective law. Such being the case, clearly the law prevailing at the time of the application must govern. Here that law is the new Limitation Act, and the proceeding is, therefore, barred.

KINDERSLEY, J. concurred.

* Vide 1 Indian Law Reports, Madras Series, p. 52

BOMBAY HIGH COURT.

The 31*st August*, 1875.

PRESENT :

Mr Justice Marriott

CHOVA KARA* (*Plaintiff*,)

versus

ISA BIN KHALIFA (*Defendant.*)

Act VIII of 1859, *S.* 123—*Written Statement—Variance between the case set up in the defendant's Written Statement and that made by him in evidence at the trial.*

A plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith and a defendant should be similarly bound To allow a defendant, who has affirmed or denied one state of facts by his pleadings, to affirm or deny the direct contrary at the trial, would render pleadings worse than nugatory, and make them but a means of working injustice and would be but to encourage fraud and perjury

MARRIOTT, J—(In delivering judgment said) —Thus the defence put forward by the written statement was that the defendant claimed the land in question as his own, but that the plaintiff was in unlawful possession, and that, in order to settle the dispute, the defendant purchased the land from the plaintiff through his agent.

At the trial the case set up was a denial *in toto* of the plaintiff's possession, and proof that the land in question always was in the possession of the defendant and his predecessors in title—in short, a case of adverse possession against the plaintiff.

At the close of the defendant's case Mr Pigot in reply submitted that, after the defendant's admission by his written statement of the plaintiff's possession, it was not competent for him to set up the case of adverse possession

I am not aware that such a case has ever been determined.

The 123rd section of the Civil Procedure Code provides that "written statements shall be brief . . . but each statement shall be confined, as much as possible, to a simple narrative of the facts, which the party, by whom or on whose behalf the written statement is made, believes to be material to the case, and which he believes he will be able to prove if called upon by the Court"

* *Vide* 1, Indian Law Reports, Bombay Series, p 209.

That section certainly contemplates that a defendant shall, in his written statement, set forth the case he intends to make at the trial.

In the case of *Eshenchunder Singh* v. *Shamachurn Bhutto** in which the decree of the High Court at Calcutta was founded on an assumed state of facts, contradictory to the case alleged in the plaint, and of the evidence adduced in support of it, and which decree was reversed by the Privy Council, Lord Westbury in giving judgment says:—"This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made. Unfortunately in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the plaintiff, and devoid, not only of allegation, but of evidence in support of it;" and, in conclusion, he says.—"Their Lordships are obliged to disapprove of the decision that has been come to by the High Court. They desire to have the rule observed that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from."

I see no reason why these observations should not be equally applicable to a defendant

Again, in the case of *Mohummud Zahoor Ali Khán* v. *Mussamut Thakooranee Rutta Koer*†, Sir James Colvile, in giving judgment, says:—"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings."

The same rule was acted on by the High Court of Calcutta in the case of *Naraınee Dossee* v. *Nurrohurry Mohonto*‡.

* 11 Moore Ind Ap 7, see pp 20 and 24

† 11 Moore Ind. Ap 468; see p 473. S. C 9 W. R. P C 9

‡ Marsh. 70.

These cases certainly show that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, and I do not see why a defendant is not similarly bound.

In the present suit not only is the case of adverse possession not raised by the written statement, but the direct contrary is alleged. The defendant has, in his written statement, solemnly affirmed to be true that very fact which in the witness-box he solemnly affirmed to be untrue, namely, that the plaintiff was in possession in 1865, and that, too, without affecting to give any explanation of the allegations in his written statement, or why his story was altered.

The first object of Courts of Justice is, by assertion on the one side and denial on the other, to bring the parties to issue, that is, to ascertain the point in dispute between them, and upon which they are to go to trial. This was done in early times by the parties orally in open Court in the presence of the Judge; now it is done by means of written pleadings. To allow a defendant, who has affirmed or denied one state of facts by his pleadings, to affirm or deny the direct contrary at the trial, would render pleadings worse than nugatory, and make them but a means of working injustice, and would be but to encourage fraud and perjury.

I hold, therefore, that it was not competent for the defendant to set up at the trial a case of adverse possession against the plaintiff, as being in direct contradiction of his written statement, and I decline to consider the evidence adduced on that point. The only defence open to the defendant is that of purchase, and this he has failed to prove.

MADRAS HIGH COURT.

The 15th July, 1875.

PRESENT

Mr. Justice Holloway and Mr. Justice Kindersley.

CHOKALINGAPISHANA NAICKER* (*Plaintiff,*)

versus

ACHIYAR and others (*Defendants.*)

Declaratory Suits.

The provision as to declaratory suits requires great care and circumspection in its application. A declaratory decree should not be made where the object of the plaintiff is to evade the stamp laws, or to eject under colour of a mere declaration of title.

The law allows a plaintiff in some cases to rectify a mistake as to stamp duty, but this privilege is subject to qualification, and does not exist where the relief to be granted is altogether distinct from that originally sought. In such a case the plaintiff should not be allowed to put an additional stamp on his plaint.

Where a plaintiff sued on a Stamp of Rs 10 for a declaration of his title to land worth Rs 19,000 in the possession of the defendant, it was held that the suit could not be maintained, and that the plaintiff was not entitled to put an additional Stamp on the plaint and convert his suit into one for possession.

In this case the plaintiff alleged that the land in dispute formed part of his zemindary, that the said land had been improperly demarcated by the karkoon of the demarcation office and that the plaintiff complained to the Collector who confirmed the demarcation proceedings of the karkoon. The plaintiff therefore sued for a declaration of his title to the land in dispute and for cancellation of the proceedings of the karkoon and of the confirmation of those proceedings by the Collector The suit having been dismissed by the Subordinate Judge as not maintainable, appeal was made to the High Court.

HOLLOWAY, J.—(In delivering judgment said):—If the plaintiff had merely complained of errors of demarcation, his prayer for a declaration of title to land alleged to have been erroneously omitted from his land by the demarcation officers would have been quite correct in form. Here, however, the Zemindar sues for a declaration of title to land worth Rs. 19,000, which when we look into the case we find to be, not in his possession, but in the possession of his adversary where it has remained undisturbed for some time. I have always felt that this provision as to declaratory suits is most dangerous, and requires great care and circumspection in its application. "Declaratory suits" are too frequently brought with the following improper objects, *viz*,—either to defeat the stamp-laws, or to throw every difficulty in the adversary's way, by preventing his raising questions which would be fairly open to him in an ejectment suit, but which are irrelevant allegations in a suit simply for a declaration of title. In this case I am satisfied that the Zemindar wanted to get possession of these lands by way of declaration and thereby deprive his adversary of the benefit of pleadings open to him in an ejectment suit which is the proper form in which the plaintiff's claim ought to be brought forward. The Advocate

* *Vide* 1, Indian Law Reports, Madras Series, p. 40.

General says that we are bound by law to allow the plaintiff to put an additional stamp on his plaint, and go on with his suit treating it as one in ejectment No doubt the law does allow a plaintiff who has paid an insufficient stamp-duty in some cases to rectify his mistake; but this privilege is subject to qualification. Suppose that a plaintiff, by some mistake or miscalculation, values his claim at a less sum than he ought, it would be excessively harsh to dismiss the suit without giving him the opportunity of putting in the additional stamps There is not the same privilege, however, where the relief to be granted is altogether distinct from that originally sought. We ought not in such a case to apply the section of the Act. The appeal must be dismissed with costs.

KINDERSLEY, J., concourred

HIGH COURT, N W P

The 11*th May*, 1876

PRESENT:

Mr Justice Pearson

QUEEN *vs* GUR BAKSH* and others.

Act X. of 1872, *ss.* 467, 468, 469 *and* 471.

Section 471 of Act X of 1872, does not deprive the Court, which possesses the power of trying an offence mentioned in ss 467, 468 and 469, of the power of trying it when committed before itself.

In this case the petitioners were convicted by the Magistrate before whom they gave false evidence. The order of the Magistrate having been confirmed on appeal, the petitioners applied to the High Court for revision of the Magistrate's order on the ground that he was not competent to try them himself.

PEARSON, J.—S 471 of the Code does not expressly prohibit the procedure adopted by the Magistrate in this case, and unless it does so, it is not contended that he was not competent to adopt it. What that section does is only to authorize any Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into any charge such as one under s. 193, Indian Penal Code, after making necessary preliminary inquiry, either to commit the case itself, or to send the case for inquiry to any Magistrate

* *Vide* 1, Indian Law Reports, Allahabad Series, p. 193

having power to try or commit for trial the accused person for the offence charged. This provision is very necessary for a Court not having power to try the offence itself, as for instance a Civil Court, but does not necessarily deprive a Magistrate of any power which he may possess to try the case himself I therefore decline to interfere in the present case and reject this petition.

CALCUTTA HIGH COURT.

The 14th and 21st December, 1875 and the 25th April, 1876.

PRESENT

Mr Justice L. S Jackson and Mr Justice McDonell

LOKENATH GHOSE* (*one of the Defendants,*)

versus

JUGOBUNDHOO ROY, (*Plaintiff.*)

Lease granted while Lessor is out of Possession—Suit for Possession by Lessee.

A transfer of property, of which the transferor is not at the time of the transfer in possession, is not *ipso facto* void

Where a patnidar, while out of possession of the patni estate, granted a durpatni thereof, *held* that the durpatnidar's suit against third persons, who were in possession of the estate, to recover possession would lie

In this case, a patnidar while out of possession of his estates granted a darpatni thereof; the dur-patnidar afterwards granted a sepatni of one of the estates to a certain individual and again took from the latter a charpatni and on attempting to take possession of the estates, he was opposed by the defendants. Hence he sued for a declaration of his durpatni and charpatni rights and for possession.

JACKSON J.—(In delivering judgment said·)—In none of the cases relied on by the appellant has it been held that a transfer of property of which the transferor is not at the time of such transfer in possession would be *ipso facto* void.

The rulings in *Bikan Singh* v. *Mussamat Parbutty Kooer*† *Chedambara Chetty* v. *Renja Krishna Muthu Vira Puchanja Naiker*‡ and *Gungahurry Nundee* v. *Raghubram Nundee*§ point to a contrary conclusion. In the first of these cases it was ruled that where

* *Vide* 1, Indian Law Reports, Calcutta Series, p 297

† 22, W. R 99 ‡ 13, B L R. 509. § 14, B L R 309

a conveyance of property was made by a person who had been in possession and enjoyment for years before, and he was wrongfully ousted, the conveyance gave a right to sue for immediate possession. In the second the Lords of the Judicial Committee of the Privy Council pointed out that the statute of champerty has no effect in the mufussil of India. they held that the true principle was that stated by Sir Barnes Peacock, *viz.*, that the Courts in India administering justice in accordance to the broad principles of equity and good conscience, will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up merely for the purpose of spoil or of litigation, and carried on for corrupt or other improper motives.

In the third the ruling was still stronger; there it was distinctly held that delivery was not necessary to complete the title of the vendee; further that this was the general rule in India, and that under the Hindu law a well defined usage acquires the force of law. Considering therefore, that the latter rulings support the view taken by the Subordinate Judge, we hold that in the present case the plaintiff had a right to bring the suit.

MADRAS HIGH COURT

The 25th February, 1876

PRESENT

Sir W. Morgan, C. J. and Mr. Justice Innes

SAYED CHANDA MIAH SAHIB* (Special *Appellant*,)

versus

LAKSHMANA AIYANGAR (Special *Respondent*.)

Madras Act VIII of 1865.

Where the parties are bound to exchange written engagements in the shape of pattás and muchalkas, the landholder must in order to maintain a suit under Sec. 9 of Madras Act VIII of 1865 to enforce acceptance of a patta, show that he has tendered a patta in writing. A mere indefinite demand or notice whether written or unwritten, is not sufficient to sustain such a suit.

The Court delivered the following judgment:—

When this suit was remanded by the Lower Appellate Court nothing more was decided by the Court than that the provisions of

---

* *Vide* 1, Indian Law Reports, Madras Series p. 45

Section 7 had been misapplied to the suit, which is a suit brought under Section 9 to enforce acceptance of a pattá: not a suit under Section 7 to enforce the terms of a tenancy.

We agree with the Lower Appellate Court in the judgment now before us in appeal, though we do not assent to all the reasons assigned for that judgment. The order of dismissal, first made by the Deputy Collector, was right because the plaintiff who sued to enforce acceptance of a pattá, failed to show the tender of a pattá, or that such tender had been dispensed with.

Where the parties are bound to exchage written engagements in the forms of pattá and muchalka, the landholder must, in order to maintain a suit to enforce acceptance of the pattá, shew that he on his part has done what the law requires from him. A mere indefinite demand or notice, whether written or unwritten, is not sufficient to sustain such a suit. A pattá should be tendered for the tenant's acceptance, and upon his refusal to accept, the landholder's right to sue to enforce acceptance arises. The appeal is dismissed with costs.

BOMBAY HIGH COURT.

The 5th April, 1876.

PRESENT:

Mr. Justice Melvill and Mr. Justice West.

REG. *versus* SHIVYA,* son of Bhagowa, and three others.

Confession—Act X of 1872, *Secs.* 122 *and* 346—*Memorandum—Certificate.*

A confession recorded under Section 122 of the Code of Criminal Procedure to be admissible in evidence must not only bear a memorandum that the Magistrate believed it to have been voluntarily made, but also a certificate, under Section 346 of the Code, that it was taken in the Magistrate's presence and hearing, and contains accurately the whole of the statement made by the accused person.

No oral evidence can be received to prove the fact of the confession, if the confession itself be inadmissible. *Reg.* v. *Bai Ratan* (2. Legal Companion p. 47) followed.

MELVILL, J.:—In this case it is admitted that if the so-called confessions of three of the prisoners be excluded from consideration, the convictions cannot be sustained. In fact, there is no other evidence of the smallest value in the case. These confessions were recorded by a Magistrate of the 3rd Class under Section 122 of the

* *Vide* 1, Indian Law Reports, Bombay Series, p. 219.

Code of Criminal Precedure. They are signed by the prisoners, and the Magistrate has made on them the memorandum required by Section 122, certifying his belief that the confessions were voluntarily made. Several objections have been taken to the admission of these confessions, but the only one which requires serious consideration is the following. Section 122 requires that confessions recorded under that Section shall be taken in the manner prescribed in Sections 345 and 346. One of the provisions of Section 346 is that the Magistrate shall certify under his own hand that the examination was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person. It is contended that the words above quoted from Section 122 render it necessary that the certificate mentioned in Section 346 should be attached to confessions recorded under the former section. On the other hand, it is argued that the memorandum as to the voluntary nature of the confession is all which the law requires, and that if the certificate mentioned in Section 346 be necessary, it does, in fact, appear upon the documents. The latter of these two arguments may be at once dismissed. It happened that the Magistate, who took the confessions, became afterwards the committing Magistrate, and nearly a month after he took the confessions he examined the prisoners previously to committal. To their examination he attached the certificate required by Section 346; but it is quite clear, to us that this certificate was not intended by him to apply to the previous confessions. The only question, then, is, whether the words of Section 122, "such confessions shall be taken in the manner provided in Sections 345 and 346," include the provision of Section 346, which requires the Magistrate's certificate. The loose and inaccurate phraseology of the two sections has already given us much trouble in *Bai Ratan's* case.* One of the points decided in that case was that the words quoted from Section 122 incorporate into that section the provision of Section 346, which requires that the accused person shall sign the record of his examination. We are now of opinion that the same words must be so liberally construed as to embrace that provision of Section 346 which relates to the Magistrate's certificate. We believe that it was the intention of the Legislature to provide the same safegaurds against the admission of confessions improperly taken

* 2, Legal Companion p. 47.

under Section 122 as are provided for examination under Section 346. We cannot conceive that a less degree of protection to the accused should have been thought necessary; on the contrary, all the precautions required to guarantee the accuracy of an examination made in open Court, at a late period of the proceedings, when the accused has heard the evidence against him, and has had time to consider his defence, must be far more necessary when the statement to be guaranteed is a confession made in the first bewilderment of an arrest, and while the accused is still in the exclusive custody of the police. The question may be looked at from another point of view. The law allows certain presumptions as to certain documents, annd on the strength of these presumptions dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove. One of these presumptions relates to confessions. Section 80 of the Evidence Act provides that, whenever any document is produced before any Court, purporting to be a statement or confession by any prisoner or accused person, taken in accordance with law, it shall be presumed that such statement or confession was duly taken. Now it is evident that, as a necessary basis for this presumption, the document must purport to show all the facts of which it would otherwise be necessary for the Court to be satisfied by direct evidence, before the confession could be used against the accused. What are those facts? First, as a matter of course, the Court would have to be satisfied that the confession was accurately taken down or repeated. Next, it would be necessary to prove that the confession had been taken in the immediate presence of a Magistrate; because, otherwise, the accused person having been in the custody of the police, the confession would be legally inadmissible. For the same reason it would be necessary to show that no inducement had been held out to the accused by threat or promise or otherwise. If, then, these three facts—*viz.*, the accuracy of the record, the presence of a Magistrate, and the voluntary nature of the confession—would otherwise have to be proved by direct evidence, they must all be stated on the face of the document, before the Court can draw a presumption of their having occurred: and these are the very three facts which are stated in the memorandum and certificate mentioned in Sections 122 and 346 respectively. This consideration leads us irresistibly to the conclusion that the Legislature must have intended that both the memo-

randum and the certificate should be attached to such confessions. The necessity of both these guarantees could not be better illustrated than by the confessions in the present case. All that is certified upon them, is that the Magistrate upon enquiry had reason to believe that they were made voluntarily. But there is nothing to show where, or by whom, or under what circumstances, they were recorded. For all that appears to the contrary, they may have been drawn up by the police, and then taken to the Magistrate for his certificate. We do not mean to suggest that this was the procedure, but the Magistrate's certificate that he believed the confessions to be voluntary is quite consistent with it. We have held in *Bai Ratan's* case* that when a confession taken under Section 122 is inadmissible in evidence, oral evidence to prove that such a confession was made, or what were the terms of the confession, is inadmissible also. We must, therefore, absolutely reject the confessions in this case, and as there is no other evidence, we must reverse the convictions. We do so with the less regret, because, even had the confessions been admissible, they are so full of reservations, contradictions, and inconsistencies, that we think we should have agreed with the assessors in acquitting the prisoners.

MADRAS HIGH COURT.

The 8th June 1876.

PRESENT:

Mr. Justice Holloway and Mr. Justice Kindersley.

ZINULABDIN ROWTEN† (*Plaintiff*)

versus

VIJIEN VIRAPATREN (*Defendant.*)

Madras Act VIII of 1865—Landholder.

A Zemindar hypothecated certain villages comprised in his Zemindari as security for a debt, at the same time leasing the said villages to the mortgagee at an annual rent, the amount of which was to be, as it fell due, credited in liquidation of the debt.

Held that the plaintiff, who was the assignee of the hypothecation deed and the lease, was not a "Landholder" within the meaning of Madras Act VIII of 1865.

HOLLOWAY, J.—We are inclined to think that Madras Act VIII of 1865 does not apply to the present case. The term "tenant,"

* 2, Legal Companion, p. 47.

† Vide 1, Indian Law Reports, Madras Series, p 49.

as employed in the Act does not mean any person who takes land from any other person. It is defined in Section 1 of the Act as including "all persons who are bound to pay rent to a landholder" A tenant then, for the purposes of the Act, is a lessee from a "farmer," or "landholder." Section 1 of the Act declares that the term 'landholders' when used in this Act shall be taken to include the following persons —"All persons holding under a Sunud-i-Milkeut Istimrar, all other Zemindars, Shrotriemdars, Jaghirdars, Inamdars, and all persons farming lands from the above persons, or farming the land revenue under Government Also all holders of land under Ryotwar settlements, or in any way subject to the payment of Land Revenue direct to Government, and all other registered holders of land in proprietary right" The term 'farmer' is not used in its ordinary English sense of one who himself cultivates land, but in the sense in which it is employed in France—a meaning given to it when we speak of farmers of revenue Farmers under the Act are men who contract to take all the profits of certain lands, and to pay a specified sum to the person from whom they take "Landholder' includes direct descendants of those named in Section 1 of the Act This man is not a direct descendant of any Zemindar, Shrotriemdar, &c. He is, therefore, not a "landholder" under the Act That seems to dispose of this case. The appeal must be dismissed with costs

KINDERSLEY, J, concurred

CALCUTTA HIGH COURT

The 31st March, 1876

PRESENT

Mr Justice L S Jackson and Mr Justice McDonell

KHAJAH ASHANOOLLAH* (*one of the Defendants*),

versus

RAMDHONE BHUTTACHARJEE (*Plaintiff*).

Limitation—Beng. Act VIII of* 1869, *S.* 27—*Suit for Possession with mesne profits—Defendants—Title.

A suit for possession of certain lands "by establishing the plaintiff's howla right," and for mesne profits, brought against a shareholder of the talook in which the lands are

---

* *Vide* 1, Indian Law Reports, Calcutta Series, p 325

situated, a former talookdar, and certain ryots who paid rent to the first defendant, is not a suit to recover the occupancy of the land from which the plaintiff has been illegally ejected by the person entitled to receive the rent, within the meaning of S. 27 of Beng. Act VIII of 1869, and is not governed by the limitation provided by that section.

JACKSON, J.—It appears to us that this is not a suit to which the provisions of S. 27 of Beng. Act VIII of 1869 could be applied for the purpose of barring the suit as not brought within one year. Whatever other difficulties that section may present in regard to suits differing from the present one, we think there are many circumstances which prevent the application of it here. In the first place, it is not simply a suit to recover the occupancy of land from which the plaintiff has been dispossessed by the person entitled to recover the rent. There is a certain complication in the facts alleged, because the plaintiff claims a howla right of which the principal defendant altogether denies the existence. He sues Khajah Ashanoollah, who is not the sole zemindar, but one of the persons entitled to the rent. He sues also Ramcoomar Sen, the previous talookdar of this estate, and he also sues the several persons who are now paying rent to Khajah Ashanoollah. The case is not therefore merely whether the plaintiff has been unduly ejected from a subsisting tenure, but whether the Courts will find and establish by their adjudication a howla right which the plaintiff asserts and the defendant denies. The plaintiff also seeks to recover wasilat. Taking all these circumstances together, it appears to us that this is not a suit of the simple nature referred to in S. 27, and that clearly limitation would not apply. But beyond that it may be observed that this question is now raised for the first time in special appeal. The only kind of limitation set up by the present special appellant in his answer to the suit was that of twelve years. He denied that the plaintiff had been in possession of the land in any shape within twelve years previous to the suit. That allegation has been disallowed by both the Courts. I may observe that the defendant's written statement in this suit has been verified by his mookhtear. No doubt, there are certain kinds of cases in which an extensive landholder may be allowed to make the verification by his local agent, but there are many allegations is this case which the defendant ought to have personally admitted by signing the verification himself, and I donot think that the Court should, in the exercise of its discretion, allow written statements such

as the present one to be verified by the mookhtear. For all these reasons, we think that the plea now set up must fail, and as there is no other point relied upon, this appeal must be dismissed with costs.

PRIVY COUNCIL.

The 1st, 2nd, 3rd, and 14th February, 1876

MOUNG SHOAY ATT* (Defendant) *Appellant,*

versus

KO BYAW (Plaintiff) *Respondent.*

Appeal from the Special Court of British Burma

Duress—Avoidance of Contract—Imprisonment

The agent of the Respondent while in custody in the Siamese territory upon a charge of stealing timber and in order to get rid of that charge, made an agreement to purchase the said timber from the Appellant on behalf of his principal at a price considerably beyond its value —

Held, that the Respondent might repudiate the agreement, as having been made by his agent without authority and when under duress, and was entitled to recover as damages certain moneys paid, and the value of certain elephants delivered thereunder, less the value of the Appellant's timber, of which the Respondent obtained or might have obtained possession.

Semble, although by the law of *England* if a man is under lawful imprisonment for a civil debt, an agreement which he makes while subject to that constraint is not by reason of his being so subject to it capable of being avoided provided that it is not unconscionable, yet imprisonment in a country where there is no settled system of law or procedure, and where the judge is invested with arbitrary powers is duress which will avoid a contract made under such circumstances

This was an appeal from a decree of the Special Court of *British Burma,* reversing a decree of the Civil Judge of the town of *Moulmein,* and giving to the Respondent a decree for Rs 8,480 with interest.

The plaintiff sued to recover Rs 28,603, as damages alleged to have been sustained by him by reason of the wrongful act of the Defendant in causing his agent, *Nga Douk alias Treephaw,* whilst under illegal duress and restraint, to enter into a certain contract or agreement, whereby he gave up, in return for 152 logs of timber,

---

* *Vide* 1, Indian Law Reports, Calcutta Series, p 330

which the Defendant purported to sell to *Nga Douk*, four elephants valued at Rs. 6,000, and their harness valued at Rs. 128, together with Rs. 3,000 belonging to the plaintiff, which was at the time in the hands of a certain *Mimmay* chief called the binyakin of *Zhine-loongyee*, for the payment of timber duty, the said binyakin being, it was alleged, in collusion with the defendant to bring about the said agreement; also the sum of Rs. 4,700 which the plaintiff stated that he had advanced to certain foresters in order to procure timber in the binyakin's territories, and which was wholly lost to the plaintiff in consequence of his having been thus wrongfully deprived of his elephants, whereby he was unable to work the timber for which he had made such advances. The plaintiff also included in the claim Rs. 9000, being hire of the four elephants for one year and three months, and at Rs. 150 each per month, and interest at 5 per cent per annum for the same period on the two sums of Rs. 3000 and Rs. 4700, the said several sums and interest making up the amount to Rs. 28,603.

The facts of the case are sufficiently set out in the judgment of their Lordships.

The judgment of their Lordships was delivered by SIR MONTAGUE E. SMITH.—This is an appeal from a decree of the Special Court of British Burma, reversing a decree of the Judge of Moulmein, which had dismissed the plaintiff's suit, and giving instead of that decree a judgment for the plaintiff for the sum of Rs. 8,480, with interest.

The plaintiff and defendant are merchants in the timber trade, residing at Moulmein, in British Burma, and it is their practice to go up into the Siamese territory, and under permission from the Government to cut timber there, and bring it down in a manner which has been described by Mr. Coryton, to Moulmein. The plaintiff, at the time when the transactions which gave occasion to these proceedings took place, did not go into the Siamese territory himself, but employed an agent called Douk to purchase timber for him, and entrusted him with a considerable sum of money, and with elephants used in drawing the timber which has been cut. It seems that Douk, on the 20th September 1870, entered into an agreement with a man called Pho to purchase some timber, 200 logs, if Pho could obtain a permit. It will be necessary,

hereafter, to consider that agreement more in detail, it is sufficient now to state the fact that such an agreement was made, and a general purport of it A few months afterwards, on the 3rd of January in the following year 1871, the defendant, who was personally on the spot, also entered into an agreement with the same man Pho, to cut timber for him, under a permit which the defendant had obtained from the Siamese authorities The defendant entered into agreements with two other foresters of a similar kind Timber was cut by Pho and by the two other foresters, and on 6th May, Douk the plaintiff's agent, went to the two creeks which seem to be called Whavpoogan and Whaykoonpai, where the timber was stacked and put his mark upon 152 logs It appears upon the evidence, that at that time there were no marks upon the timber, except those of the foresters who had cut it It seems that Pho had cut 81 of these logs and the two other men had cut 71 logs The defendant hearing of this proceeding complained to a Siamese officer, styled binyakin who was said to be a Judge of the district, of what Douk had done and the Judge sent a peon with the defendant to arrest Douk, and to bring him before him It seems that after searching for Douk for two or three days, he was found, and taken into custody, considerable violence being used How far some violence was necessary to secure him, or what degree of force might reasonably have been employed for that purpose, does not appear, but certainly it would seem that a great deal of violence was used, that he was beaten, tied with a rope, and in this state carried into the presence of the binyakin. When there the binyakin put Douk into irons, with an iron collar round his neck, and it is said that threats of personal violence were used towards him, unchecked by the binyakin. There is probably some exaggeration in the evidence upon that point But enough remains to show that he was not only placed in imprisonment, but had these irons put upon him, and an iron collar Under these circumstances he was charged with having put his mark upon the logs, and he was charged with having so done fraudulently and criminally That being the state of affairs, and Douk being evidently under great apprehension at the time as to what further might happen, it was proposed that he, having put his mark upon the timber, should purchase it, then there was a parley as to the price, and ultimately it was stated that the price he must give for this timber should be 45 rupees a log, a

price certainly much larger than the value of the timber as it then lay. It is said to be the law of Siam that a man who has improperly put his mark upon timber which does not belong to him is liable to pay the value of 10 logs for every log so marked. That law or custom is by no means clearly proved, but whether it be so or not, it is clear that the agreement for the purchase of the logs by Douk was at a price considerably beyond their value

It has been argued on the part of the appellant that although Douk must be considered as a prisoner at the time before this Judge, yet his imprisonment was lawful, and therefore that the contract cannot be avoided on the ground that he was under illegal constraint at the time he made it. The Judge of Moulmein is right in his view of the law of England, that in this country if a man is under lawful imprisonment for a civil debt, an agreement which he makes while subject to that constraint, is not, by reason of his being so subject to it, capable of being avoided, provided that it is not unconscionable. But imprisonment in a country where there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, is duress of a wholly different kind. In the one case the prisoner knows that the length and severity of his imprisonment are defined and limited by the law, and cannot be exceeded; whereas in the other the prisoner neither knows what will be the length of his imprisonment, nor what amount of pain and misery he may be put to; all is indefinite; and therefore the apprehension acting on the mind of a man in such a situation would be infinitely greater than if he were imprisoned in a country like England, where the law is settled, and cannot be exceeded by the Judge.

With regard to the actual circumstances of this imprisonment, there was a great deal of violence used at the time of the arrest, and whether some violence was justified or not by Douk's resistance, it is unquestionable that he received a severe beating, which would affect the state of his mind. Then he was put into irons. The charge is made against him—not that he had unintentionally put his mark upon the property of another—but that he had done so criminally, with a view to steal it. He knew what had happened and might happen again in this Siamese territory,—that a wrongful act of that kind might be very severely punished, and to an extent

which in this country might be supposed to be disproportionate to the offence.

No doubt, speaking generally, all matters relating to a contract are to be decided by the law of the country where the contract is made, but there are principles of universal application by which all contracts, wherever made, must be judged. The first principle of contract is, that there should be voluntary consent to it. In this country duress has always been held to avoid a contract, except in certain cases where the imprisonment is lawful. But this exception would not be held to apply to a case where a man is in custody upon a criminal charge like the present, and has made an agreement to give a benefit to another to release him from that charge; in fact such a contract in this country would be held to be void on other grounds. Upon the face of it this contract shows that the man was charged with a criminal offence. ' Treephaw—that is Douk—requests not to raise contention against me with regard to having stolen, impressed, and struck with hammer mark the 152 logs of teak timber which has been cut, worked, and kept at the place allotted by Moung Shoay Att in the forest, for which Moung Shoay Att obtained the Imperial order and written permit" It was to get rid of that charge of having stolen these logs, when he was in custody under the circumstances which have been referred to, that this agreement was made. Their Lordships therefore think that the plaintiff may repudiate it, as having been made by his agent when under duress.

It is to be observed that the treaty between the British Government and the Siamese Government contains this clause " With reference to the punishment of offences or the settlement of disputes, it is agreed that all criminal cases in which both parties are British subjects, or in which the defendant is a British subject, shall be tried and determined by the British Consul" It seems, therefore, that the binyakin had no jurisdiction to try the offence, and the proceedings bear the character of an attempt, by bringing Douk before this Judge, to extort an agreement from him.

Their Lordships for these reasons think that this agreement does not in any way bind the plaintiff; and inasmuch as Rs. 3,000 of his money was paid, and his elephants were delivered under it, that he is entitled to bring this suit.

A question was raised whether the agreement had not been confirmed and ratified by the subsequent acts of the plaintiff, or Douk as his agent No doubt, if there had been a clear ratification, it being in the power of the plaintiff to ratify or reject it, if there were circumstances from which a ratification might properly be presumed he would be bound by it but their Lordships do not find any evidence of such a ratification The delivery of the elephants was in effect made before the constraint or the apprehension of constraint had disappeared, for simultaneously with entering into this agreement, it appears that Douk gave an order to the man who had the custody of the elephants, to give them up to the defendant and although the actual delivery did not take place immediately, it was made in consequence of that order, and Douk says he was in such a state of apprehension that he could do nothing afterwards, and as soon as he recovered from his beating, went down to Moulmein. The other point is that the timber was accepted by the plaintiff But their Lordships think that it was not accepted under such circumstances as constitute a ratification, because, all the way through, Douk was protesting against this agreement, and so was the plaintiff claiming the timber as his own property.

Another ground suggested by the Special Court on which this agreement could not be sustained as against the plaintiff, seems to their Lordships to be well founded Douk being in custody upon a criminal charge had clearly no authority to part with his employer's property, or to make an agreement to part with it, to relieve himself from such a charge If there had been any question of a civil nature, it might have been within the scope of his authority as a general agent, to compromise such a claim, but when charged with personal misconduct and a crime, which it cannot be assumed that his principal had authorised, no authority from the employer can be implied that his money and his elephants should be handed over to the man making the charge, in order to relieve his agent from it. It is sufficient, however, to decide that the agreement is avoided on the ground of duress, for, as the Lower Appellate Court observes, this last ground for impeaching the agreement was not made in the pleadings

Their Lordships having come to this conclusion upon the agreement, it follows that the decree in favor of the plaintiff must stand.

Then the question arises whether a deduction should not be made from the amount of the decree for the value of the timber, which their Lordships are satisfied the plaintiff got into his possession. Undoubtedly, if the timber belonged to the plaintiff, and the claim made by the defendant upon it was an invalid one, no deduction ought to be made from the damages, although possession of it may have been obtained in consequence of this agreement. This raises the question to whom the timber belonged at the time when this agreement was made upon the 10th May. (His Lordship, after going through the evidence on this point and finding it in favor of the defendant, continued)—Their Lordships are therefore of opinion that the total amount decreed and payable to the plaintiff under the decree appealed from should be reduced by the sum of Rs. 3,040, being the value of the 152 logs of timber at Rs 20 per log The amount so reduced will be payable to the plaintiff with interest thereon at five per cent., from the date of the said decree to the date of realization

Their Lordships will humbly advise Her Majesty that the decree be varied by making the reduction in these terms, and that in other respects it be affirmed The decree being thus varied, their Lordships think there should be no costs of this appeal.

SHORT NOTES.

Privy Council.

Charitable Gift—Failure of Object—Cypres Performance

The doctrine of *cypres* as applied to charities rests on the view that charity in the abstract is the *substance* of the gift, and the particular disposition merely the *mode*, so that in the eye of the Court, the gift notwithstanding the particular disposition may not be capable of execution subsists as a legacy which never fails and cannot lapse

It cannot be laid down as a general principle that the *cypres* doctrine is displaced where the residuary bequest is to a charity, or that among charities there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it

H H

On the failure of a specific charitable bequest, jurisdiction arises to act on the *cyprès* doctrine, whether the residue be given in charity or not, unless upon the construction of the will a direction can be implied that the bequest if it fails should go to the residue.

In applying the *cyprès* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for object akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *cyprès* scheme to benefit that locality.

Unless the *cyprès* scheme framed by the lower Court be plainly wrong, a Court of Appeal should not interfere with it.

Vide 1, Indian Law Reports, Calcutta Series, p. 303. (Appeal from Calcutta High Court). The 1st and 2nd December 1875 and 5th February 1876.—The Mayor of Lyons *vs.* The Advocate General of Bengal and others.

Mortgage by Conditional Sale—Equity of Redemption—Course of decisions in Madras and Bombay Presidencies.

The contract of mortgage by conditional sale is a form of security known throughout India, and which by the ancient law of India, which must be taken to prevail in every part of India where it has not been modified by actual legislation or established practice, is enforcable according to its letter.

From the year 1858, the Courts of the Madras Presidency, and from the year 1864, the Courts of the Presidency of Bombay, have erroneously and in contravention of the law of India as declared by the earlier decisions, adopted with regard to this class of securities doctrines which the English Courts of Equity have applied to mortgages in England.

Quære whether in dealing with future cases the Judicial Committee ought to follow the new course of decision which has sprung up in these Presidencies, or their own decision in the case of *Pattabhiramier* v. *Vencatarow Naicken* (7 B. L. R. 136; S. C. 13 Moore's I. A. 560)?

The essential characteristic of a mortgage by conditional sale, is, that on the breach of the condition of repayment the contract executes itself, and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them.

Where land was mortgaged on a condition that the rents should be applied first in payment of the Government revenue, next in payment of the salary of a manager, and afterwards in reduction of the debt, and it was further stipulated that instalments of a fixed

amount should be paid up to a certain date by the mortgagor to the mortgagee, and that on that date a settlement of accounts should be made, and in the event of there being a balance against the mortgagor and his not paying the same on a date fixed the mortgagee should become the purchaser at a fixed value of so much of the land as would satisfy such balance retaining his right to sue the mortgagor personally for any further sum that might remain due owing to the whole of the land as valued growing insufficient to satisfy such balance: *Held* that this was not a contract of mortgage by conditional sale.

Vide 1, Indian Law Reports, Madras Series p 1 (Appeal form Madras High Court) The 26th June 1875 Thumbusawmy Moodelly and another *vs* Hossain Rowthen and others

BOMBAY HIGH COURT

Act VIII of 1859, *s.* 119—*Ex parte Decree.*

The Court of first instance refused to receive the defendants' written statement, because it had been tendered after the day on which the Court had ordered it to be filed, and the delay had not been satisfactorily explained The Court, however, framed the issues in the presence of the defendants' pleader, who was also permitted to cross examine the plaintiff's witnesses The Court made a decree in favor of the plaintiff In appeal, the District Judge held that the decree of the first Court was *ex parte*, under Section 119 of the Civil Procedure Code, and that, therefore, no appeal lay

Held by the High Court in special appeal that the decree of the first Court was not *ex parte* under the circumstances

Vide 1, Indian Law Reports, Bombay Series, p 217. (Westropp, C J and Kemball J) The 5th April, 1876. Raghapa Bin Hanmapá *vs* Parapá bin Shivapá

Act X. *of* 1872, *ss.* 314 *and* 18—*Combined Sentence for several Offences—Confirmation Appeal.*

The aggregate of the sentences passed under s. 314 of the Code of Criminal Procedure in a case of simultaneous convictions for several offences, must be considered a single sentence for the purposes of confirmation or appeal.

Vide 1, Indian Law Reports, Bombay Series, p 223. (Melvill and West, J. J) The 12th April, 1876. Reg *vs* Rama Bhivgowda

Act X of 1872, *secs.* 220, 314 *and* 454—*Penal Code, secs.* 457 *and* 380—*Simultaneous conviction of several offences—Sentence.*

In a case of conviction of house-breaking by night, in order to commit theft, under Section 457, and theft, under Sec. 380 of the Indian Penal Code, there may either be one sentence for both

offences, or separate sentences for each offence, provided that the total punishment awarded does not exceed that which may be given for the graver offence.

Vide 1, Indian Law Reports, Bombay Series, p 214 Full Bench The 14th September, 1875 Reg. *vs.* Tukaya Bin Tamana.

HIGH COURT N W P

Hindu Law.—Hindu Widow.—Maintenance.

Held by the Full Bench that a Hindu widow is not entitled under the Mitakshara, to be maintained by her husband's relatives merely because of the relationship between them and her husband. Her right depends upon the existence in their hands of ancestral property.

Held, on the case being returned to the Division Bench, that the fact that the defendant in this case was in possession of ancestral immoveable property at the death of his son and had subsequently sold such property to pay his own debts, did not give the son's widow any claim to be maintained by him.

Vide 1, Indian Law Reports, Allahabad Series, p 170 (Full Bench) the 8th May 1876 Gunga Bai *vs.* Sita Ram.

Act VIII of 1859, *s.* 338—*Act XXIII of* 1861, *S* 38—*Execution of Decree—Appeal—Miscellaneous Proceedings.*

Pending the determination of the appeal against an order passed in execution of decree, the Appellate Court has power, under Sec. 338, Act VIII of 1859, and Sec. 38, Act XXIII of 1861, to stay execution.

Vide 1, Indian Law Reports, Allahabad Series, p 178 (Full Bench) the 11th May, 1876 Harshankar Parshad.

Act VIII of 1859, *Sec.* 6—*Act XXIII of* 1861, *Sec.* 38—*Execution of Decree—Miscellaneous Proceedings—Transfer.*

A District Court is competent under Sec. 6, Act VIII of 1859, and Sec. 38, Act XXIII of 1861, to transfer to its own file proceedings in execution of decree pending in a Court subordinate to it.

Vide 1, Indian Law Reports, Allahabad Series, p 180, (Full Bench) the 11th May, 1876 Gaya Parshad *vs.* Bhup Singh and others.

Act VIII *of* 1859, *Sec* 254—*Sale in Execution—Defaulting Purchaser—Appeal—High Court—Appellate Civil Jurisdiction—Division Court—Letters Patent, cl.* 10.

An appeal lies from an order passed on an application under Sec. 254, Act VIII of 1859, to make a defaulting purchaser liable for the loss occasioned by a re-sale.

Held (Spankie, J., dissenting), that the appeal given to the Full Court, under cl 10, Letters Patent, is not confined to the point on which the Judges of the Division Court differ.

Vide 1, Indian Law Reports, Allahabad Series, p. 181. (Full Bench.) The 11th May, 1876. Ram Dial *vs.* Ram Doss.

MADRAS HIGH COURT.

Rules of High Court of 1866—*Attorneys.*

The 4th and 5th Rules of Court of 1866 are within the powers conferred on the High Court by the Letters Patent of 1865; and, the provisions of the Letters Patent "relating to the admission and powers of Advocates, Vakils and Attorneys" are authorized by 24 and 25 Vict. Cap. 104.

Vide 1, Indian Law Reports, Madras Series, p. 24. (Full Bench.) The 14th January, 1875. In the matter of the Petition of the Attorneys.

Sec. 280 *of the Criminal Procedure Code—Enhancement of Punishment by Appellate Court.*

Sec. 280 of the Criminal Procedure Code authorizes an appellate Court, subject to the proviso in the final sentence, to enhance any punishment that has been awarded.

As an Appellate Court, 1st Class Magistrate has power to pass any sentence which Subordinate Magistrate might have passed.

Vide 1, Indian Law Reports, Madras, Series, p. 54. The 22nd February 1876.

Criminal breach of trust by trustee of temple—Jurisdiction of Ordinary Criminal Courts.

The ordinary Criminal Law is not excluded by Regulation VII of 1817, or Act XX, of 1863.

Vide 1, Indian Law Reports, Madras Series, p. 55.

AN ELEMENTARY COURSE OF LAW LECTURES.

LECTURE 1.

On the Several Kinds of Property.

The surface of the earth, and all things* above it, upon it, or below it, whether animal, vegetable, or mineral, and whether natural or artificial, and benefits derivable from or connected with the same, may form the subject of ownership or property. And ownership or property, in its strict sense, is that exclusive right, which, at law or in equity, or both at law and in equity, the jurisprudence of a country creates in favor of some particular person or persons in regard to a given thing; although the word property† is frequently used to designate, not the right to a thing, but the thing itself, when regarded with reference to such right.

Things which are the subject of property are distributed into two kinds‡: things *real* and things *personal*. They are further divided into things *corporeal*, and things *incorporeal.*

Things *real* are those which are permanent, fixed, and immovable,§ which cannot be carried out of their place; as lands and other tenements.

---

* The word *thing* includes all animate and inanimate objects of sense which are not persons. But besides this, which is the ordinary and popular meaning of the term, that which is not yet in existence may be the subject of rights, and as such is called 'a thing.' Thus the ship which is not yet built but which the ship-builder has promised to build, the coming year's crops, the easement of light and air, the unpaid debt, may all be subjects of rights, and are spoken of as things. To mark this distinction, things are divided into corporeal and incorporeal. The distinction must not be overlooked; for, as we shall see hereafter, some rules of law depend upon it. *Vide* Markby's Elements of Law, Chap. III, Sec. 116.

† Mr. Justice Markby in his Elements of Law, Chap. VII, Sec. 296, says "What I have called 'ownership' is sometimes called 'property.' But the word 'property' also signifies the thing owned; and it is inconvenient to call the thing, and the right over it, by the same name."

‡ "Property, according to the Hindu Law, is of four descriptions, real, personal, ancestral, and acquired. I use the terms real and personal in preference to the terms movable and immovable, because, although the latter words would furnish a more strict translation of the expressions in the original, yet the Hindu law classes amongst things immovable, property which is of an opposite nature, such as slaves and corrodies, or assignments on land." *Vide* Macnaghten's Principles of Hindu and Mahomedan Law, page 1.

There is no distinction between real and personal; nor between ancestral and acquired property, in the Mahomedan Law of Inheritance. *Vide* Macnaghten's Principles of Hindu and Mahomedan Law, p. 151.

§ In Act I of 1868 S. 2, Cl. 5 (The General Clauses' Act, 1868), it is provided that "Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. This provision applies to all Acts made by the Governor-General of India in Council after this Act came into operation.

Things *personal* are goods, money, and all other movables,¶ which may attend the owner's person wherever he thinks proper to go, and which either are or easily may become transferable.

Corporeal things are things which are the objects of sense, consisting of such things as may be seen and handled by the body; such as houses and land.

Incorporeal things are not the object of sensation, can neither be seen nor handled, and are creatures of the mind, and exist only in contemplation.

The word *land* in its legal signification includes the surface and substance of the earth, under all circumstances, though covered with water or buildings, and everything which is permanently fixed to the ground or incident to it, whether above it, upon it, or under it, such as houses, woods, waters,** mines, fossils.

The word *tenement* is a word of still greater extent, and though in its vulgar acceptation is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum*, franktenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and, as lands and houses are tenements, so

¶ "A man has a right to remove a house which is built upon his own land, but it could not be contended that a *pucca* house built upon his own land is movable property, because he has a right to remove it; and that the land itself is immovable. If a house which is built upon a man's own land is not movable property, a house built upon land which is rented from another does not seem to fall within the word 'movable.' If such a house is not movable property, there seems to be no reason why a mud house should be held to be movable property, and the same reasoning appears applicable to a hut. In any one of these cases, a right to remove may exist, and the materials of which the erection is composed is capable of being removed, although the removal in one case would be attended with a greater degree of labor than in other. But the question as to whether the property is movable or not, cannot depend upon the amount of labor which is required to remove it." *Vide* 2, B. L. R. p. 77; 10 W. R. p. 416. In Act I, of 1868 (The General Clauses' Act) movable property is defined to be "Property of every description, except immovable property."

** It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water, by the name of *water* only, either by calculating its capacity, as, for so many cubical yards; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a movable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immovable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other." Blackstone's commentaries Vol. II, p. 16.

is an advowson a tenement; and a franchise, an office, a right of common, a peerage or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements

The word *hereditament* is by much the largest and most comprehensive expression for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal or mixed Thus an heir-loom, or implement of furniture which by custom descends to the heir together with an house is neither land nor tenement, but a mere movable, yet, being inheritable, is comprised under the general word hereditament: and a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament

Hereditaments, then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal hereditaments consist wholly of substantial and permanent objects, all of which may be comprehended under the general denomination of land only. An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same. It is not the thing corporate itself, which may consist in lands, houses, jewels or the like, but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled. incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they, being merely a contingent springing right collateral

to or issuing out of lands, can never be the object of sense · that casual share of the annual increase is not, till severed, capable of being shewn to the eye, nor of being delivered into bodily possession *

Some incorporeal hereditaments which are rights of mere accommodation, are termed easements Of these there are a great number, such as rights of way, rights to receive air, light and water Others which are directly profitable are called profits à prendre, such as rights of common A profit à prendre in another's soil cannot be claimed by custom, for this reason, among others, that such person's property might thus be subject to the most grievous burdens in favor of successive multitudes, as the inhabitants of a parish or other district, who could not release the right

Incorporeal hereditaments are principally of ten sorts, advowsons, tithes, commons, ways offices dignities, franchises, corrodies or pensions, annuities and rents

(1) *An advowson* is a right of presentation to an ecclesiastical benefice from time to time, whenever a vacancy occurs †

(2) *Tithe* is a right to the tenth part of the increase yearly arising and accruing from the profits of lands the stock upon lands and the personal industry of the inhabitants, the first species being usually called predial, as of corn grass, hops, and wood, the second

* "The term possession, as we have hitherto explained it, clearly assumes some tangible existing thing over which the party in possession may exercise his physical control But the Roman lawyers extended the idea of possession to abstractions to things which are not perceptible to the senses, to incorporeal things as they are usually called by lawyers * * * * Many of the rules which govern the question of possession are founded on the existence of something which may be seen, felt and handled, and it is only by a metaphor that the rules can be extended to a right which may be enjoyed This is an easy metaphor when confined within certain limits as for example when we speak of a person who enjoys the use of a pathway or a watercourse running over the land of another as being in possession of the way, or of the water course But it would be at the least a bold metaphor to speak of a doctor in large practice as in possession (in a legal sense) of his practice" —*Vide* Markby's Elements of Law, ss 358 and 360 In a suit the plaintiff claimed possession of Brit Mohal Brahminy, i e, a right to officiate at funeral ceremonies The Calcutta High Court (L S Jackson and G C Paul J J) in dismissing the suit observed That which the plaintiff sought to recover was as found by the Court of first instance a thing intangible and impalpable, and there are many ways in which this case might be put to show that such a thing as the alleged right in question is incapable of transfer It could not be attached and sold nor could delivery of possession be given Therefore, the Moonsiff was right in dismissing the suit *Vide* 16 W R p 171 Jhumun Pandey *vs* Dinoonath Pandey

† The right of presentation and the right of nomination to a church are distinct things Presentation is the offering a clerk to the bishop nomination is the offering a clerk to the patron These rights may exist in different persons at the same time

mixed, as of wool, milk, pigs, &c; and the third, personal, as of manual occupation.

(3) *Common* is a right or privilege to take or use some portion of that which another's lands, waters, woods, &c, produce. It is chiefly of four sorts: common of pasture, of piscary, of turbary, and of estovers.

(4) A right of *way* is a private right of going over another man's ground. It may be a way to be used alone, or in company, on foot, or on horse-back, with carriages or cattle. The title to it may be by express grant, or by prescription or by necessary implication.

(5) *Offices*, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments whether public, as those of Magistrates; or private, as of bailiffs, receivers, and the like.

(6) *Dignities* bear a near relation to offices. It will here be sufficient to mention them as a species of incorporeal hereditament, wherein a man may have a property or estate.

(7) A *franchise* or liberty is a Royal privilege or branch of the Royal prerogative subsisting in the hands of a subject. Being derived from the Crown, franchises must arise from a Royal grant, or, in some cases, they may be held by prescription which presupposes a grant. Some of the most important franchises are forests, chases, parks, and free warren.

(8) *Corrodies* are a right of sustenance or to receive certain allotments of victual and provision for one's maintenance. In lieu of which a pension or sum of money is sometimes substituted.

(9) An *annuity*, in the widest sense of the term, is a right to a yearly sum not payable as interest, and chargeable both upon real and personal estate, or either upon real or personal estate of the grantor or testator who created the annuity, or upon his person only. But an annuity specifically so called, as distinguished from a rent charge, is a right to a yearly sum not payable as interest, and chargeable only upon the person or personal estate of the grantor or testator by whom it is created.

(10) A *rent* is a right to a certain thing, whether money, or a chattel, or service, to be rendered periodically, as a compensation or acknowledgment for the possession of real estate, or as a charge thereon.

Things personal are divided into chattels real and chattels personal. Real chattels, or chattel interests, are interests or minor estates, carved out of greater, as leases for terms of years. Chattels personal are so called, because for the most part they are connected with or may accompany the person of the owner, and do not concern realty. They comprise such things as are movable; as money, garments, furniture, cattle.

The word *estate*, in ordinary discourse is applied only to land but, in law, obtains the same signification as property, and may be either *real* or personal.

PRIVY COUNCIL

The 5th and 6th May, 1876

On Appeal from Calcutta High Court

BISHESWARI DEBYA* (Plaintiff) . ... *Appellant,*

versus

GOVIND PERSAD TEWARI and others (Defendants) *Respondents.*

Plaint—Cause of Action—Consent by Benameedar

The plaint alleged that the three first Defendants, with a brother since deceased, purchased a putnee mehal therein described; that the same was thereafter sold for arrears of rent and purchased by the said three Defendants with their own funds; but that the Collector, in compliance with their petition, entered the name of their mother, the fourth Defendant, as the purchaser. The plaint then alleged a subsequent sale by the three first Defendants to the Plaintiff, that they the said Defendants caused a kobala to be executed by the fourth Defendant and that they, being the real owners, became witnesses to the deed, and received the whole of the consideration money; and prayed, by reason of ouster and disturbance alleged, for damages against all the Defendants for breach of the following covenant contained in the kobala:

"If any one making any objection to the sale by me of the said mehal give you trouble in any way, then I will put matters straight. If I fail to do so I will return the consideration money. If I do not return it you will realize it by means of a suit."

The Civil Judge in whose Court the plaint was filed held that no cause of action was shewn, and the High Court, on appeal, remanded the case to try whether there had been the ouster and disturbance alleged, and whether, under the circumstances, they constituted a breach of the contract. The High Court, however, dismissed the suit against the three first Defendants, holding that the mother only was bound by the contract.—

---

* *Vide* 3 Law Reports, Indian Appeals, p. 191.

Held, by their Lordships, that the plaint disclosed a cause of action against all the Defendants, and that the case must be remanded accordingly. One issue raised by the plaint was whether the kobala was really entered into by the mother as the agent and on behalf of the three first Defendants, and by their authority.

SIR MONTAGUE E. SMITH :—

Their Lordships think, differing from the opinion of the High Court, that there ought to be a remand of the whole cause, and against all the Defendants, for trial to the Civil Judge. Both the Courts below have given judgment upon the plaint, and the instrument of sale referred to in the plaint, without any evidence having been gone into. The Civil Judge was of opinion that upon these documents no cause of action was shewn against any of the Defendants. The High Court thought he was wrong in that view so far as regards one of the Defendants, the fourth, but held that there was no cause of action against the first, second, and third Defendants, who are the sons of the fourth.

The facts which appear upon the allegations in the plaint are to this effect, that the three first Defendants, with a brother who has since died, purchased a property called lot *Chagram*, a putnee mehal in pergunnah *Khond Ghose*, from *Nand Kishore Dass*, the former Mohunt of the *Rajgunge Akhra* ; that having failed to pay the rent to the zemindar, lot *Chagram* was sold, and was purchased for Rs. 22,000 by the three sons, the three first Defendants, as sebaits of *Iswar Gopal Jeo Thakoor* ; that subsequently they presented a petition praying that the name of their mother, *Champa Koomari*, the Defendant No. 4, might be inserted as purchaser in the place of their names, and that the Collector, in compliance with their petition, entered her name as the purchaser. But the plaint states that the consideration money was paid out of the funds of the Defendants, the sons. Then the plaint goes on to allege the sale to the Plaintiff, which it states in this way: " Subsequently on their being desirous of selling the aforesaid lot *Chagram*, I consented to purchase it, as they (Defendants Nos. 1 to 3) were at that time indebted to me in a considerable amount, and agreed to allow a deduction in the consideration money in part satisfaction of their debt referred to; accordingly"—then comes what is really the most material allegation in the plaint—" on the 9th of Assar 1276 they caused a kobala to be executed by the auction purchaser, *i. e.*, Defendant No. 4, for a consideration of Rs. 22,200,

and the Defendants Nos 1 to 3, being the real owners, became witnesses to the deed" The plaint then refers to a stipulation, for the breach of which the action is brought, which will be referred to presently It then goes on to shew how the consideration money was arranged. "A sum of Rs. 12,672 was deducted both on account of principal and interest, in part satisfaction of the debt which the Defendants Nos. 1 to 3 owed to me on the bonds they had executed in my favor, and one of the bonds was returned to them; Rs 3,950 was deducted in part liquidation of the money they owed me on mortgage of certain personalties which, in proportion to the said payment, they took back, and the balance i e, Rs 5,577-8*a*, they have received in (currency) notes and in ready money" The three sons received the whole of the consideration, they were released from large debts, and received the balance in money This is the mode in which the contract is stated. The contract of sale itself is set out, and no doubt appears to be a contract entered into by the mother (*Champa*) with the Plaintiff But that is perfectly consistent with her being benameedar, and perfectly consistent with all the allegations in the plaint, that the sons caused her to enter into it on their behalf, they being the real owners, they being the real vendors, and they being the persons who actually received the purchase-money, which in a given event was to be returned.

The action is brought for a breach of this provision in the instrument of sale "If any one making any objection to the sale by me of the said mehal give you trouble in any way, then I will put matters straight. If I fail to do so I will return the consideration money. If I do not return it you will realize it by means of a suit"—that clause providing that in the event of disturbance, and the matter not being put straight, the purchase-money should be refunded. The breach alleged in the plaint is that after the Plaintiff had held possession of the mehal as the proprietor thereof, "the Collector of *Burdwan*, whom the High Court appointed in the month of Kartick 1277, as the receiver of the estates belonging to the *Rajgunge Akhra*, ousted me in his capacity of receiver from the above mehal, when I made an application to the High Court, seeking to have the estate released; but the High Court disallowed my prayer, whereupon I wished the Defendants either to release the estate or refund the consideration money as stipulated in the kobala.

They said that they would have the matter settled, but have neglected to do so."

The Civil Judge upon this plaint, and upon this instrument of sale, held that there was no cause of action against anybody, apparently on the ground that this stipulation in the bill of sale was not intended to provide against a general defect of title, but only against objections arising from the personal status of the benameedar, the mother, as a Hindu widow. The High Court thought this view was erroneous, and their Lordships entirely agree with the High Court in the opinion that there is a question to be tried, *viz.*, whether there has been the ouster and disturbance alleged, and whether under the circumstances they constitute a breach of the contract. This is a question depending on the evidence, and the High Court properly remanded the cause to the Civil Judge to try it. But, having made this remand they decided that the contract was one which bound the mother only, and that the sons not being bound by it, the suit ought to stand dismissed against them.

Their Lordships have some difficulty in perceiving the exact grounds upon which the High Court have come to this conclusion. Mr. Justice *Markby* seems to admit that there may be circumstances under which the real parties may be bound although the contract is entered into nominally with the benameedar. But he says "It is contended before us that because *Champa Koomari* was only what is called a benamdar, therefore all the covenants which she made in this transaction are binding upon the true owners of the property. But no authority for that very general proposition is produced before us, and I certainly do not feel inclined or authorized to lay down any such proposition." Their Lordships agree with Mr Justice *Markby* that no such general proposition can be laid down. The question in all these cases is with whom the contract was made. Cases may be supposed where the contract may be intended to be made, and may be, in fact, made with the nominal party only; but, on the other hand, there may be cases where the contract is with the real parties, and probably in the greater number it will be found that the contract is so made; and when persons are interested on the one side in the estate, and on the other in the money to be received for the estate, the parties who are so beneficially interested on either side are those between whom it may be expected that

the contract would actually be. Mr. Justice *Markby* says at the end of his judgment, "Whether the male Defendants would have been liable had the Plaintiff's case been that their names were not disclosed in the transaction, although they were the real vendors, it is not necessary to determine. I think it must be taken upon this plaint that the Plaintiff, knowing the circumstances, has elected to deal with the female Defendant on the footing that she is the owner." Their Lordships think that the learned Judge has taken a mistaken view of the plaint, because, so far from its appearing upon the plaint (whatever may hereafter appear upon the evidence) that the Plaintiff has elected to deal with the female Defendant, the allegations all point the other way; the allegations are that the sons caused the contract to be made, and the plaint throughout treats the mother as the mere instrument, and the sons as the parties entering into the contract.

The question, therefore, to be tried on this point will be, whether this contract was really entered into by the mother as the agent and on behalf of the three sons and by their authority. If it should appear from all the circumstances that the plaintiff, knowing the facts, really did elect to treat the mother as the sole contracting party, then the plaintiff will fail.

Mr. *Forsyth* in his argument contended that although it might be true that the mother was the agent in making the sale, she must be deemed to be the principal in entering into this particular instrument. Their Lordships think that upon the face of this plaint there is no foundation for such a distinction. This is not a case where an authority is given to an agent to sell, and the agent exceeds his authority by entering into a particular stipulation; because not only is it averred in the plaint (of course that is to be proved) that the sons caused their mother to sell this property, but also that they assented to the instrument of sale by becoming attesting witnesses to it. If that should turn out to be the case when the evidence is given, it would appear that they authorized not only the sale itself, but a sale in the very terms of the kobala which the mother executed.

Their Lordships give no opinion whatever on the case upon the merits. They desire to say no more than this, that upon the plaint and allegations found in it, they think that the Plaintiff has disclosed what may be a cause of action against all the

Defendants. Whether or not she proves her case at the trial is a totally different question, upon which no opinion can now be given.

In the result, therefore, their Lordships will humbly advise Her Majesty to direct that the decree of the High Court be varied, by ordering that the cause be remanded as against all the Defendants.

Their Lordships see no reason why the ordinary rule as to costs should not prevail in this case. The Plaintiff will, therefore, have the costs of this appeal, and of the appeal to High Court; and their Lordships will direct that the costs of this appeal be taxed by the Registrar, and that these costs and the costs of the appeal to the High Court be the Plaintiff's costs in the cause in any event

---

CALCUTTA HIGH COURT

The 13th July, 1876

PRESENT

Mr. Justice Macpherson and Mr Justice McDonell

PORAO CHAMAR *vs* SHEIKH ISMAIL.

Section 309 of Act X of 1872—Illegality of Sentence—Bench of Magistrates—Absence of the Chairman

A sentence of imprisonment passed in violation of Section 65, of the Penal Code, which provides that the term shall not exceed one fourth of the maximum period of imprisonment fixed for the offence is illegal

Where in a trial by a Bench of Magistrates the Chairman was not present during the case for the prosecution and heard only the evidence for the defence, the proceedings were held to be bad, and the conviction set aside

This was a case of assault, tried sometime back by a Bench of Magistrates at Sealdah. The defendant was found guilty, and sentenced to pay a fine of Rs 16, and, in default, to one month's rigorous imprisonment Upon the application of the defendant's pleader, Mr. Lackersteen, the Magistrate of the district sent for the record of the case, under Section 295 of the Criminal Procedure Code, and called upon the Deputy Magistrate of Sealdah for an explanation of the alleged irregular proceedings and illegal sentence. The irregular procedure consisted in the Deputy Magistrate not having been present during the case for the prosecution, and in his having heard only the evidence for the defence, upon the latter

portion of which his decision was, in effect, based. The sentence of imprisonment passed in default of payment of the fine was illegal, as it was in violation of Section 65 of the Indian Penal Code, which provides that the term shall not exceed one-fourth of the maximum period of imprisonment fixed for the offence. The explanation submitted by the Deputy Magistrate not being deemed satisfactory, the Magistrate of 24-Pergunnahs reported the proceedings for the orders of the High Court. The following judgment was passed :—

Judgment.—We think that the Officiating Magistrate is right in the interpretation he puts upon the final clause of Section 309 of the Criminal Procedure Code. We also think that the proceedings of the Bench of Magistrates were bad, by reason of the absence of the Chairman in the manner detailed. We, therefore, set aside the conviction and sentence; and the fine, if it has been paid, must be refunded.

CALCUTTA HIGH COURT.

The 4th and 14th September, 1876.

PRESENT:

The Hon'ble Sir Richard Garth, *Kt*, *Chief Justice*, and the Hon'ble Mr Justice Macpherson.

PREM CHAND BURAL, (Claimant) *Appellant*,

versus

THE COLLECTOR OF CALCUTTA, *Respondent*.

Land Acquisition Act of 1870—*Mode of Assessing Compensation to Owners.*

The fairest and most favorable principle of compensation to the owners is to ascertain what is the market value of the property, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it.

Messrs. Woodroffe and Jackson, instructed by Mr. Carruthers, for the Appellant.

The Advocate-General, instructed by the Government Solicitor, for the Respondent.

This was an appeal from a decision of the Judge of the 24-Pergunnahs, awarding the claimant Rs. 31,192 as compensation for certain property of his in Bow-Bazar, which had been taken up by the

Government under the Act, for the purpose of building a Social Science Institution.

The Judgment of the High Court was as follows :—

Garth, C J (Macpherson, J , concurring)—In this case I think that the learned Judge in the Court below has not done full justice to the owners of the property

He has substantially adopted the valuation of the Collector; and has made his award upon the supposition, that the fair mode of estimating the price of the property in the market, is to capitalize its present rental at so many years' purchase

I consider that having regard to the evidence on both sides, this is not a fair way of arriving at the market value

Where Government takes property from private persons under statutory powers, it is only right that those persons should obtain such a measure of compensation as is warranted by the current price of similar property in the neighbourhood, without any special reference to the uses to which it may be applied at the time when it is taken by the Government, or to the price which its owners may previously have given for it

Of course, if it can be satisfactory shown that the purposes to which the land is applied are as productive as any other to which it is applicable, or that the price given by the owners is its full market value, it would be very just to assess the compensation upon that basis But in this case I find no evidence to that effect. On the contrary, it would appear that a considerable portion of the land is virtually unoccupied, and that the owners had previously prepared a plan for laying out the whole area to much greater advantage, and, moreover, it is in evidence that the claimants bought the property at a lower rate, in consequence of the title having been seriously questioned by two professional gentlemen. We have therefore to consider, having regard to the evidence on both sides, what is a fair sum to award to the claimant in respect of this land, but, before we enter upon this question, there is a preliminary point which it is desirable that we should at once dispose of

Mr. Jackson insists that his clients are entitled to the agreed price of the buildings, as they stand, in addition to the fair value of the land itself. But I do not see how, upon any principle of compensation which has been suggested in argument, his claim in

this respect can be supported; and I have tried in vain to discover why the learned Judge who tried the case in the Court below, or the assessors, thought it right to allow the owners this sum.

If you estimate the value of the property upon its present rental, and capitalize that rental into so many years' purchase, you are, in fact, taking into consideration the value of the buildings, and if you award the sum thus arrived at to the owners, you are, in fact, paying them the value of the buildings, so that, besides giving them the value of the buildings as they stand, you would be paying them for the buildings twice over.

But, then, suppose you proceed upon another principle. Instead of estimating the value of the property according to its present uses and its present rental, suppose you ascertain what it would be worth, if occupied in a different way as for a bazar, or for shops, or other buildings of a lucrative character. Estimating it in this way, you must necessarily take into consideration that the present buildings must all be pulled down, because until they are pulled down, the land could not be applied to its new and more advantageous uses, and all that the owners could possibly obtain, or ask, for the buildings, under such circumstances, would be the price of the old materials.

Then, there is again a third principle of valuation, in which the same result would follow, as in the first mode of estimating the value, and that is to suppose the buildings to remain standing, and to estimate them at a capitalized rental value while you estimate the remainder of the property at its market value treating it as unoccupied land.

This principle of valuation would prove anything but favorable to the owners, because they could not expect to get for Mrs. Romaine's house, with a bazar or shops built round it, as much rent as they have hitherto obtained, nor could they lay out the frontage land to advantage, with the small buildings which now occupy a portion of it, obstructing the full range of the street. But if this principle were adopted, the owners could not then be entitled to the capitalized rental of the buildings as well as to their value as they stand, because they would in this way be again receiving the value of the buildings twice over.

This point being disposed of, it seems clear that the fairest and most favorable principle of compensation to the owners, is that up-

on which the weight of the argument on both sides has been bestowed; *viz*, what is the market value of the property, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it.

And, after full consideration, it appears to me that the fair amount of compensation to award to the owners upon this principle is Rs 39,500

Three of the claimant's witnesses—one of them Shambhu Nath Rai, a large landowner in Calcutta, who, it seems, has had extensive dealings in house property—state the value of the claimant's land, back and front, at Rs 800 a cottah. Now, having regard to the large area of back land, as compared with the frontage, and also the fact that 15 cottahs are occupied by the tank, Rs. 800 per cottah seems rather a high average for the land all round. The frontage is, no doubt, valuable; and, making all due allowance for some of the properties mentioned by the witnesses commanding a higher price in consequence of the purchasers requiring them for special purposes, I cannot estimate the frontage at less than Rs. 1,000 a cottah

Making the same allowance, then, which it is generally fair to do in cases of this nature for a little over statement on the part of the claimant's witnesses, Rs. 700 a cottah would, probably, be a fair price for the entire area.

This would give for the 55 cottahs Rs. 38,500.

If, instead of calculating the whole area together, we were to estimate the front land (say 15 cottahs) at Rs. 1,000 and the back land at Rs. 600 per cottah, the result would be very nearly the same. Say—

15 Cottahs at Rs 1,000	.. ..	15,000	0	0
40 Cottahs at Rs. 600	.. ..	24,000	0	0
	Rs.	39,000	0	0

Or, if we were to adopt the evidence given for the Government, their first witness says that he purchased 32 and 33 Bow-Bazar, occupying an area very nearly of the same extent as the claimant's (between 54 and 55 cottahs) for Rs. 38,000. He gave this sum, with the building in very bad repair—a fact which we all know depreciates, sometimes unduly, the value of house property. Taking, then, the claimant's property of equal extent to be worth an equal

sum, the result would be much the same as the sum which we propose to allow.

Then, if to this sum we add another Rs 1,000 for severance of the portion adjoining Champatollah Lane, we consider the plaintiff will be properly compensated.

The damage caused by severance is not considerable; the two portions of the property have been, in fact, divided by a wall, and the severed portion still retains a frontage upon Champatollah Lane.

We, therefore, set aside the award of the Judge, and fix the amount of compensation at Rs. 39 500 to which the Collector will of course have to add the statutory 15 per cent.

The owners will have the costs of this appeal, and the costs to which they are entitled in the Court below will be calculated according to the rule adopted by Mr. Beaufort—that is to say, the cost which would be allowed in a regular suit.

The owners are also entitled to interest at 6 per cent. upon the sum which we award for compensation from the time when the Government took possession of the property.

CALCUTTA HIGH COURT.

The 14th August, 1876.

PRESENT:

The Hon'ble Sir R Garth Kt, *Chief Justice,* and the Hon'ble Mr Justice Kemp, Mr Justice Jackson, Mr Justice Macpherson, and Mr Justice Markby

BHOYRUB CHUNDER BANDHOPADHYA, (Plaintiff) *Appellant,*

versus

SOUDAMINI DEBI, (Defendant) *Respondent.*

Government Revenue—Auction-Purchaser's liability to pay—Commences from date of sale and not from date of the confirmation of sale.

When an auction sale is confirmed and the purchaser obtains a certificate, the interest of the judgment debtor must be held to have ceased from the date of sale and to have become vested in the purchaser. Therefore, the auction-purchaser's liability to pay Government Revenue must be held to commence from the date of the sale and not from the date of the confirmation of the sale.

This was a special appeal from a decision passed by the Subordinate Judge of Burdwan, dated the 28th July 1874, modifying a

decree of the Sudder Munsif of that district, dated the 29th October 1873; and the point of law involved was referred by the Chief Justice and Mr Justice Birch to a full Bench.

The following was the order of reference :—

The plaintiff and defendant in this suit became purchasers respectively of two different shares in the same property at an execution sale.

The sale was completed on the 15th Assin 1279, but the defendant did not obtain possession until the 24th Bysak 1280.

Between the date of the sale and the time when the sale was confirmed (and when the defendant obtained possession), a considerable sum became due, in respect of the whole property purchased, for Government revenue; and, in order to prevent proceedings being taken by the Government authorities to enforce payment of this sum, the plaintiff, who was the purchaser of by far the largest share of the property, paid the amount due to the Government authorities, and then brought a suit to recover from the defendant the proportion due in respect to her share.

The defendant's answer was that she did not become liable to pay any revenue to Government upon her share until after the confirmation of her purchase, and that no part of the revenue claimed accrued due after that time.

These facts being admitted, the question arises whether the defendant became liable to pay revenue in respect of her share from the date of her purchase, or from the date of confirmation of it.

Upon this point, there are conflicting authorities in the High Court.

The case of Kali Das Neogi *versus* Hur Nath Roy Chowdhry, (Gap. W. R., p. 279) appears to have decided that the title of an auction-purchaser under a decree relates back to the date of sale, although the sale may not have been confirmed until long afterwards; the case of Bepin Behari Biswas *versus* Jodu Nath Huzra (XXI. W. R., p. 367), on the other hand, appears to have decided that the title of a purchaser under similar circumstances accrues only from the date of confirmation of the sale.

The point, therefore, is referred to a Full Bench for their determination.

The Judgment of the Full Bench, delivered by Mr. Justice Kemp, in the absence of Mr. Justice Macpherson, was as follows :—

Kemp, J.—The question which we propose to decide in this case is whether the plaintiff is entitled to recover from the defendant certain sums paid by the plaintiff for Government revenue, due in respect of a share now owned by the defendant in a Zemindari, the larger share of which belongs to the plaintiff.

The proceedings do not show very accurately what the precise position of the parties is, but the facts seem to be as follows :—

The plaintiff owns, as *Zemindar* and Putnidar (or partly as Zemindar, and partly as Putnidar), a 15 ans 3 gundas 3 cowries share of an Estate Lot Nimdabo, registered as No. 75 in the Collectorate of Burdwan, and Krishna Prosunno Mozoomdar and another were the Zemindars of the remaining small share, 16 gundas 1 cowrie. The total revenue payable to the Collector in respect of the estate was Rs 8,807 4 ans. 11 gundas Of this, Rs 8,356 9 ans 11 gundas. represented the plaintiff's share, and Rs 150 11 ans was the share of Krishna Prosunno Mozoomdar, &c ; and the plaintiff states in the plaint that he was entrusted with the payment of the whole revenue, as well what was due in respect of his own share of the Zemindari and his own share of the Putni, as what was due in respect of the share of Krishna Prosunno Mozoomdar, &c. The share of Krishna Prosunno Mozoomdar, &c., having been attached, and sold in execution of the decree of a Civil Court, one half of it was purchased by the defendant Soudamini. Certain instalments of Government revenue having fallen due between the date of the execution sale and the date on which Soundamini's purchase was confirmed by the order of the Court, they were paid by the plaintiff, who, in truth, was obliged to pay them, in order to save the whole estate from being sold by the Collector The question is whether, as the sale to Soudamini was eventually confirmed, she is not now liable to refund to the plaintiff the sum so paid by him.

The defendant denies her liability in respect of any Government revenue which accrued due prior to the date of confirmation of her purchase.

In our opinion, the sale having been confirmed, and the purchaser having obtained a Certificate, the interest of the Judgment-debtor must be held, for the purposes of this suit, to have ceased from the date of the sale, and to have then become vested in the

purchaser. That being so, we think that the purchaser, the defendant Soudamini, must be deemed the person liable to pay the amount of Government revenue in question, and that, therefore, the plaintiff is entitled to recover from her the payments which he made on account of her share of the property, amounting (after giving her credit for the Rs. 25 which she has paid) to Rs. 168-15½ ,with interest on that sum at the rate of 6 per cent, from the time or times when the payments were made.

The judgment of the Lower Appellate Court will be altered accordingly, and the plaintiff, the appellant, will have the costs of this appeal.

Markby, J.—I concur in thinking that, under the circumstances of this case, the appellant had a right to recover from the respondent the amount claimed in respect of the two payments of Government revenue made by the appellant for the January and March quarters of 1872

CALCUTTA HIGH COURT.

The 9th, 16th and 20th March, 1876.

PRESENT :

Mr Justice Phear and Mr. Justice Markby.

THE QUEEN *vs.* UPENDRONATH DOSS* and another.

Act X of 1875 (*High Court's Criminal Procedure Act*), *s.* 147—*Case transferred to High Court—Notice to Prosecutor—Penal Code, ss.* 292 *and* 294—*Specific Charge—Procedure on Transfer to High Court*

In an application for the transfer of a case under s 147, Act X of 1875, in which the prisoner has been convicted and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *primâ facie* cause shown, that the case be removed without notice to the Crown

Semble.—A charge under ss 292 and 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should in his decision state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within

---

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 356.

the meaning of those sections Where no such specific decision has been given, the High Court, when the case has been transferred under s 147, Act X of 1875, may either try the case *de novo*, or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained

PHEAR, J —This case now comes before us by reason of its having been removed to this Court from the Court of the Magistrate of Calcutta, Northern Division, by an order made under s 147 of the High Courts' Criminal Procedure Act

The learned Standing Counsel, on behalf of the Crown, objected that the order had been irregularly made, because the Crown was not served with notice of the application for it, and was not given an opportunity of being heard upon that application We are of opinion, however, that when, as in the present case, a conviction has been arrived at by the Magistrate, and the petitioner is actually suffering imprisonment thereunder, it is within the discretion of this Court to order for sufficient *primâ facie* cause shown, on the application of the prisoner, that the case be removed, without notice to the Crown We intimated our readiness to give time to the Standing Counsel if he required it for the purpose of this hearing, but he said he was quite prepared to go on with the case without delay

The charge preferred against the petitioners and some other person upon which they were tried by the Magistrate, appears in the Court book, which the Magistrate has sent up to us, in the following words —"Defendants are charged with having, on 1st March, at Beadon Street in Calcutta exhibited to public view certain obscene representations Defendants are further charged with having at the time and place aforesaid uttered or recited certain obscene words to the annoyance of others ss 292 and 294 of the Penal Code," and the original order or conviction made and signed by the Magistrate after hearing the evidence given on both sides appears to have been as follows —"Defendants (2) and (3) Upendronath Dass and Omirtololl Bose" (the two petitioners to this Court) "are found guilty under ss 292 and 294 of the Penal Code, and sentenced to suffer imprisonment for one month"

The scope of each of the two sections, 292 and 294, of the Penal Code is wide, and it is much to be regretted that the charge against the prisoners was not made specific in regard to the

representations and words alleged to have been exhibited, uttered, and to be obscene, before at least the accused persons were called upon to answer it And it was certainly very important, both in the interest of the accused persons, and of the public, that the Magistrate, in his decision of the matter, should have stated distinctly what were the particular representations and words which he found in the evidence the convicted persons had exhibited and uttered, and which he adjudged to be obscene within the meaning of these sections.

Had the case remained as the Magistrate's book represents it, we should have been reduced to the alternative of either practically trying the case *de novo* or of dismissing it, upon the ground that the Magistrate had come to no finding upon which his conviction could be sustained Fortunately, however, since the conviction has been impeached by the making of the application for the removal of the case to this Court, the Magistrate has formally drawn up his specific findings of fact and his order thereon, and we may now safely assume that this document discloses all that in the opinion of the Magistrate is established by the evidence against the petitioners within the scope of ss 292 and 294 of the Penal Code Taking first, that portion of his finding which refers to s. 292, we have it thus —' Be it remembered that, on the 8th day of March A D 1876, before P Dickens, Esquire, Magistrate of Calcutta, Northern Division, Omritolall Bose is convicted on a charge of (1) having on the 1st day of March 1876 at the Great National Theatre at Beadon Street in Calcutta aforesaid wilfully exhibited to public view, during the performance of a certain Bengali play, called Surendro Binodini an obscene representation, to wit the representation of a woman having her saree stained with blood in front, carried in the arms of a man having his shirt stained with blood in front, intending thereby to represent the immediate results of such woman having been deflowered by such man' A precisely similar finding is stated in regard to the other petitioner, Opendrolal Doss

We have carefully considered all the depositions and other materials of this case, and we are of opinion that they do not afford ground upon which the Magistrate could legally arrive at this finding of fact, so far as it specifies that which the petitioners intended to

represent. And, this being so, it is not necessary for us to discuss the details of the evidence bearing on this point.

The remainder of the Magistrate's finding which refers to Section 294, may be given shortly as follows:—That the petitioner, "in a public place, to wit, the said Great National Theatre, recited and uttered during the performance of the said Bengali play, called 'Surendro Binodini,' certain obscene words, to wit—Have you not got a handsome sister? Send her to my bed one day. I consent to give you some money," and 'Beauty, I can't wait any longer, I am still addressing you in soft words. Consent to bestow your love; if you don't consent, I will take it against your will;" and "Beauty, come to my embrace. I am not a tiger, or a bear, or a hog. I want to taste your love," to the annoyance of others. We are of opinion that these words and passages, whatever animadversion the use and utterance of them on the occasion described may be open to, are not obscene, within the meaning of Sections 292 and 294 of the Indian Penal Code. It thus appears to us that the grounds upon which the Magistrate has placed his conviction in this case fail, and we can discover in the evidence no other ground upon which it could legally be supported. It follows that the conviction must be quashed, the sentence set aside, and the petitioners released from the obligation of their recognizances.

SHORT NOTES

PRIVY COUNCIL

Istemrari Mokurrari Tenure—Death of Grantee without Heirs—Escheat—Incidents of Tenure

Lands belonging to a zemindari granted by the zemindar under an absolute hereditary mokurrari tenure, do not, on the death of the grantee without heirs, revert to the zemindar; nor does the zemindar, under such circumstances, take by escheat a tenure subordinate to and carved out of his zemindari.

Where there is a failure of heirs, the Crown by the general prerogative will take the property by escheat, subject to any trusts or charges affecting it; and there is nothing in the nature of a mokurrari tenure which should prevent the Crown from so taking it subject to the payment of the rent reserved under it.

The recognition by the owner of lands of the interest of parties in possession by the receipt of rent from them, constitutes a tenancy requiring to be determined by notice or otherwise before such parties can be treated as trespassers

Vide I, Indian Law Reports, Calcutta Series p 391 —(appeal from Calcutta High Court) The 11th February 1876 Sonet Kooer v Himmut Bahadoor

---

CALCUTTA HIGH COURT

Mortgage—Lien of Mortgagee on Sale of Right, Title, and Interest of Mortgagor—Writ of fi fa —Purchaser at Sheriff's sale at instance of mortgagee

N, M and G borrowed from B a sum of Rs 12,000, to secure repayment of which they executed in her favor a joint and several bond in May 1863 for payment of the said sum with interest on the 6th of May 1864, and also a warrant to confess judgment on the bond. On the 27th of April 1864, N, M and G executed a mortgage, in the English form, of certain property to B, purporting to do so in pursuance of an agreement alleged to have been entered into between them and B at the time the money was advanced by B in 1863; but the evidence was not sufficient to show that such agreement had been entered into Under a writ of *fi fa*, issued previously to the mortgage of 1864 *viz* on the 23rd of March 1864, in a suit against M and N, the Sheriff sold to A. on the 7th July 1864, the right, title and interest of M and N in the mortgaged property. Assuming that an agreement to mortgage had been entered into in 1863, A had no notice of such agreement After this, a writ of *fi. fa.* was issued by the Sheriff, at the instance of B, in execution of a decree which B had caused to be entered upon the bond of May 1863; and under that writ the Sheriff, on the 22nd February 1866, sold the right, title and interest of N, M and G in the mortgaged property, and A became the purchaser The purchase-money at this sale was paid to B, and A entered into possession of the property.

In a suit by B against A and others on the mortgage of the 27th of April 1864, for foreclosure or sale of the property, the Court below (PHEAR, J.) *held*:—

That the *fi. fa*, issued on the 23rd of March 1864, previously to the mortgage, must be taken to have operated against the share of M and N from the date when it was issued;

That even if there was an agreement to mortgage, as alleged, then, although as against N, M and G themselves, a Court of Equity would treat such agreement as equivalent to an actual mortgage, yet it would not do so as against a purchaser under the *fi. fa.*, without notice; and

That the sale of the 7th July 1864, therefore, passed the shares of M and N to A free of any rights or equities of B.

Further, that the sale by the Sheriff, of the 22nd February 1866, having been effected at the instance of B, for the purpose of realizing the mortgage-debt, was operative, as between B and A, to pass to A the entire shares of N, M and G in the property free of B's mortgage lien.

Held on appeal, that no agreement to mortgage being established, the sale by the Sheriff to A in 1864 overrode the mortgage to B, and passed to A the shares of M and N.

Held further, that the sale by the Sheriff in 1866 being of the right, title and interest of N, M and G, and made at the instance of B, without notice of her mortgage, and B having received the purchase-money, which would appear to have been estimated on the value of the unencumbered shares, and no objection having been made to the sale by the mortgagors, who had allowed A to hold unchallenged possession ever since, the entire equitable estate in the share of G must be taken to have passed to A.

A mortgagee is not entitled, by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately. To allow him to do so would deprive the mortgagor of a privilege which is an equitable incident of the contract of mortgage,—namely, a fair allowance of time to enable him to redeem the property.

Vide 1, Indian Law Reports, Calcutta Series, p. 337 (Sir R. Garth, Kt. C. J. and Pontifix, J.) The 13th and 14th March and 16th May 7876—Bhuggobutty Dossee *v.* Shama Churn Bose.

Hindu Law—Widow—Maintenance—Lien on Estate of Husband bonâ fide Purchaser.

The lien of a Hindu widow for maintenance out of the estate of her deceased husband is not a charge on that estate in the hands of a *bonâ fide* purchaser irrespective of notice of such lien.

A Hindu widow, before she can enforce her charge for maintenance against property of her deceased husband in the hands of a purchaser from his heir, must show that there is no property of the deceased in the hands of the heir.

Debts contracted by a Hindu take precedence of his widow's claim for maintenance, and *semble*, that if a portion of his porperty is sold after his death to pay such debts, the widow cannot enforce her charge for maintenauce against such property in the hands of the purchaser.

Quere.—Whether a Hindu widow, by obtaining against her husband's heir a personal decree for maintenance unaccompanied by any declaration of a charge on the estate, does not lose her charge upon the estate.

Vide 1 Indian Law Reports, Calcutta Series p 36 (L S Jackson, J) The 11th and 12th June 1873, and 15th June 1876, Adhurmee Narain Coomary, *vs* Shona Malee Pat Mahadai and Buddya Dhur

Resumption, Suit for—Onus Probandi—Auction-Purchaser.

Certain lands which had been let out in putni were, on default by the putnidar in payment of rent, sold by auction under Reg. VIII of 1819 and purchased by *M* who granted them in putni to the plaintiff. In a suit for resumption on the allegation that the defendants were in possession of a portion of the lands as invalid lakhiraj by withholding payment of the mâl rent thereof from after 1793, the defence was that the lands in dispute were valid rent-free lands existing as such from before 1790. *Held* that, on the grounds of the decision of the Privy Council in *Harihar Mukopadhya* v. *Madab Chandra Babu* (8 B L. R , 566), the principle that the onus is on the plaintiff to show that the lands are mâl applies to cases where the plaintiff, as in the present case, in the representative of an auction-purchaser.

Vide 1 Indian Law Reports, Calcutta Series p 578, (Glover and Mitter, J. J) The 28th March 1876—Afunnessa *vs.* Peary Mohun Mookerjee

Appeal--Reg. VIII of 1819, *s* 6—24 *&* 25 *Vict., c.* 104, *s.* 15.

There is no appeal from an order made by the Civil Court under s. 6 of Regulation VIII of 1819.

Per BIRCH, J.—A party who has preferred an appeal to the High Court when the law gave him no right of appeal, is not en-

titled upon the hearing to ask the Court to treat it as an application for the exercise of its extraordinary jurisdiction under s. 15 of 24 & 25 Vict., c. 104.

Vide 1. Indian Law Reports, Calcutta Series p. 383 (Birch and Morris, J. J.) The 4th April 1876. In the matter of the petition of Soorja Kant Acharj Chowdry.

Costs—Special Appeal—Order in Discretion of Lower Court.

Where, in a suit for defamation, a decree was given for the plaintiff for nominal damages, but he was ordered to pay the defendant's costs, *held* that the order as to costs was in the discretion of the Court below, and therefore no special appeal would lie from such order: the rule as laid down in *Gridhari Lal Roy* v. *Sundar Bibi* (B. L. R., Sup. Vol., 496) being that an order as to costs cannot be interfered with in special appeal unless it is illegal.

Semble—When the Court is of opinion that the plaintiff is not entitled to any substantial damages, it is not bound to award him nominal damages.

Vide 1. Indian Law Reports, Calcutta Series p. 385 (Markby and Mitter, J. J.) The 10th April 1876, Futeek Parooee *vs.* Mohender Nath Mozoomdar.

Majority Act (IX of 1875), *s.* 3—*Minor—Guardian ad litem.*

The appointment of a guardian *ad litem* is sufficient to make the minor party subject to s. 3, Act IX of 1875 and to constitute his period of majority at 21, at any rate so far as relates to the property in suit, notwithstanding that such minor would but for such appointment have attained majority at 18.

Vide 1. Indian Law Reports, Calcutta Series p. 388 (Pontifex, J.) The 7th July 1876. Suttya Ghosal *v.* Suttanund Ghosal and others.

MADRAS HIGH COURT.

Whipping Act, VI of 1864, *s.* 7—*Illegality of sentence of whipping, or its execution, on person who is under one or other of certain heavy sentences.*

A sentence of whipping passed on a person who is already under sentence of death, or transportation, or penal servitude, or imprisonment for more than five years, is illegal. If the sentence of whipping precede, instead of follow, the other sentence, the

passing of the latter sentence renders the infliction of the whipping illegal.

Vide 1, Indian Law Reports Madras Series p 56 (Full Bench) The 19th April 1876

Mortgage—Local law in Malabar.

In the case of a mortgage of the kind prevailing in a certain part of Malabar called a "peruartham" mortgage, when the mortgagor redeems, the mortgagee is entitled (before restoration of the mortgaged land) to be paid its market value at the time of redemption, not the amount for which the land was mortgaged.

Vide 1, Indian Law Reports, Madras Series p 57 (Holloway and Innes, J J) The 10th July 1876 P Shekari Varma Valia Rajah *v* Mangalam Ammanir and others

Sale of lands for arrears of "tirvai" (rent)—Petition under Insolvent Debtors' Act previously filed by the tenant.—Validity of sale as against Official Assignee.

Where a tenant of land owing arrears of "tirvai" (rent), takes the benefit of the Insolvent Debtors' Act, 11 and 12 Vic, c. 21, the Official Assignee must elect, and express his election, to take the land *cum onere*, otherwise he acquires no interest in it Where such election has not been made and a suit for possession is brought by a purchaser at an auction sale held by the revenue authorities for the arrears, the insolvent cannot plead a *jus tertii* in the assignee

Vide 1 Indian Law Report Madras Series p 59 (Holloway and Innes, J J) The 10th July 1876 Chinna Subbaraya Mudali and others *vs* Kandaswami Reddi

---

BOMBAY HIGH COURT.

Narvadari or Bhagdari village—Partition among Narvadars or Bhagdars—Bombay Act V of 1862.

There is nothing in Bombay Act V of 1862 which debars a Civil Court from making a decree for the partition of *Narvadari* land among *Bhagdars*, even though such partition may cause a further division of recognized sub-divisions of *Bhags*

Vide 1 Indian Law Reports, Bombay Series p 225 (Melvill and Kemball, J J) The 14th June 1876 Venibhai *vs* Raghabhai.

Cotton—Adulteration—Possession—Bombay Act IX of 1863, s. 2.

Possession of adulterated cotton, even though accompanied by a knowledge that the cotton is adulterated, is not sufficient to sus-

tain a conviction of fraudulent adulteration or deterioration of cotton under the Cotton Frauds Act (Bombay Act IX of 1863). No criminality attaches to such possession till the cotton is actually offered for sale or compression.

Vide 1, Indian Law Reports, Bombay Series, p. 228 (Melvill and Kemball, J. J.) The 14th June 1876. Reg *vs.* Hanmant Gavda.

High Court Criminal Procedure Act (X of 1875) *s.* 32 *to* 37—*Hindu Prisoner—Constitution of Jury.*

A prisoner not being a European British subject, who is not charged jointly with a European British subject, is not entitled, under the provisions of the High Court Criminal Procedure Act (X of 1875), to be tried, by a jury of which, at least, five persons shall not be Europeans or Americans.

Vide 1, Indian Law Reports, Bombay Series, p. 232 (Westropp, C. J., and Sargent and Green, J. J.) The 22nd July 1876. Reg. *vs.* Lalubhai Gopaldass and others.

HIGH COURT N.-W. P.

Redemption of Mortgage—Burden of Proof as to Ownership—Act I of 1872, *s.* 110—*Partial Relief.*

The plaintiffs, averring that their ancestor had mortgaged three villages to the ancestors of the defendants in 1812 for Rs. 2,500, putting the mortgagees into possession, sued to recover possession of 15 biswas of each village, asserting that the mortgage-debt had been redeemed from the usufruct. The defendants, admitting the proprietary title of the ancestor of the plaintiffs to the villages, alleged, as to 10 biswas of each village, that they were sold to their ancestors in 1842 by him for Rs. 1,250; and, as to the other 10 biswas of each village, that they were subsequently mortgaged to their ancestors by him for Rs. 14,000, borrowed by him from them for the purpose of defending a suit arising out of the previous sale, which sum had not been satisfied from the usufruct.

Held (STUART, C. J., dissenting), that the burden of proving the mortgage of the 10 biswas of each village of which the defendants alleged the sale lay on the plaintiffs.

Per STUART, C. J. *contra.*

Held also (STUART, C. J., and TURNER, J., dissenting), that the plaintiffs, having failed to prove the averments on which their suit

was based, were not entitled to any relief in respect of that portion of the property in suit of which the defendants admitted their possession as mortgagees

Per STUART, C. J., and TURNER, J., *contra*.

Vide 1, Indian Law Reports, Allahabad Series p 194. (Full Bench) The 92nd May. 1876 Ratan Kuar and others *vs.* Jiwan Singh and others

Pre-emption—Minor—Legal Disability—Limitation—Act IX of 1871, *s.* 7 *and sch. ii,* 10.

The provisions of s. 7, Act IX of 1871, are applicable in computing the period of limitation in suits to enforce a right of pre-emption.

Where a condition for pre-emption contained in a record of rights was intended to take effect at the time of a sale and its language implied that the co-sharers in whose favor it was made were to be persons who were competent at that time to make a binding contract to accept or refuse an offer, no right of pre-emption accrued under the condition to a co-sharer who was a minor at the time of a sale and unrepresented by any person competent to conclude a binding contract on his behalf, whether it was assumed that the condition arose out of special contract or general usage.

Vide 1, Indian Law Reports, Allahabad Series, p 207 (Pearson and Turner, J. J.) The 22nd May 1876. Raja Ram *vs.* Bansi and others

Execution of Decree—Irregularity—Sale in Execution—Act VIII of 1859, *s.* 257.

G and M obtained a money-decree against K in the Court of the Principal Sudder Amin on the 12th December, 1864. This decree was reversed by the District Judge, but on the 5th March, 1866, the Sudder Court set aside the Judge's decree and ordered a new trial. On the 5th May, 1866, the District Judge affirmed the decree of the Court of first instance. On the 3rd December, 1866, the High Court again set aside the Judge's decree and ordered a new trial. On the 14th January, 1867, the District Judge again affirmed the decree of the Court of first instance, and no appeal being preferred, the decree became final. The decree-holders had in the meantime taken proceedings to execute the decree dated the 5th May, 1866, and from time to time, and finally on the 7th November, 1870, they renewed these proceedings, in each instance referring to the decree dated the 5th May, 1866, even after it was

set aside and the decree dated the 14th January, 1867, passed. On the last application a sale of certain immoveable property belonging to K was ordered, and took place on the 15th February, 1871. K objected to the confirmation of the sale on the ground of the irregularity in the application, but his objections were disallowed and the sale was confirmed. He brought a suit to recover possession of the property from the auction-purchaser on the ground that the sale was a nullity. *Held, per* STUART, C. J., and PEARSON, TURNER, and SPANKIE, JJ., that the sale ought not to be set aside, as the irregularity in applying for execution of the decree dated the 5th May, 1866, was an irregularity which did not prejudice the judgment-debtor.

Per OLDFIELD, J.—That, with reference to s. 257, Act VIII of 1859, the suit was not maintainable.

Vide 1, Indian Law Reports, Allahabad Series, p. 212 (Full Bench). The 24th April 1874. Ghazi and others *vs.* Kadir Buksh and another

Act XVIII of 1873, *s.* 93, *cl.* (*a*)—*Bhaòli—Money-equivalent—Rent—Revenue Court—Civil Court—Jurisdiction.*

Held (Pearson, J., dissenting), that a suit for the money-equivalent of arrears of rent payable in kind is a suit for arrears of rent within the meaning of s. 93, Act XVIII of 1873, and therefore cognizable by a Revenue Court.

Per PEARSON, J.—Such a suit, being a suit for damages for a breach of contract, is cognizable by a Civil Court.

Vide 1, Indian Law Report, Allahabad Series, p. 217 (Full Bench). The 27th April 1876 Tajuddin Khan *vs.* Ram Parshad Bhagat.

Act VIII of 1859, *s.* 308—*Pauper Suit—Institution of Suit—Presentation of Plaint—Limitation.*

Where an application for permission to sue *in formâ pauperis* is numbered and registered, and deemed to be the plaint in the suit, not in consequence of proof of the plaintiff's pauperism, but in consequence of his abandoning his claim to sue as a pauper and paying for the stamps required for the institution of the suit, the date of such payment, and not the date of the application, must be taken, in computing the period of limitation, to be the date of the presentation of the plaint and the institution of the suit.

Vide 1, Indian Law Reports, Allahabad Series, p. 230 (Sir R. Stuart, Kt, C J, and Pearson, J) The 29th May 1876, Skinner *vs.* Orde and others

MADRAS HIGH COURT.

The 24th April 1876.

PRESENT:

Sir W. Morgan, Kt., C. J., and Holloway, J.

SINI THIRUVENGADATHIENGAR* and six others (Defendants) *Appellants*,

versus

SANGILIVEERAPPA PANDYA CHINNATHUMBIAR (Plaintiff) *Respondent.*

Act VIII of 1859, *s.* 15.—*Suit for declaratory decree.—Slander of title.*

When a person is in possession of his estate as rightful owner, he is not entitled to a decree declaring him to be the rightful owner, because another person has issued proclamations and orders to the ryots of the estate to pay rent to him and made an application to the Collector to be registered as the owner and did other like acts of pretension to the title. A declaratory decree cannot be made unless there be a right to consequential relief.

In this case the plaintiff was in rightful possession of his estate, but the defendant having issued proclamations and orders to the ryots to pay rent to him the (defendant) and having made application to the Collector to be registered as the owner and having done other like acts of pretentions to the title, the plaintiff brought a suit under S. 15 of Act VIII of 1859, for obtaining a decree declaring him to be the rightful owner. The plaintiff having got a decree in his favor, the defendant appealed to the High Court.

THE CHIEF JUSTICE.—The Court stated orally, at the close of the argument, that the decree of the Lower Court must be reversed, on the ground that it was a declaratory decree given in a case in which no consequential relief could have been obtained, if such relief had been asked for. The plaintiff proved no actual injury and no apprehension of injury such as to justify a prayer to the Court for relief.

I will now give in writing my reasons for this judgment.

Whatever may have been the course of decisions on the words of the 15th section of the Code of Civil Procedure, the true construction of that clause and the effect to be given to it must be considered as now settled by the late decision in the case of Kathama Nauchiar *v.* Dorasinga Tever.†

---

* *Vide* 1, Indian Law Reports, Madras Series, p. 65.

† L. R. 2. I. A. 169; S. C. 15. Beng. L. R. 83.

It was there determined that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court.

If, therefore, the case stated is one in which no relief could be given, if asked for, the Court should make no decree declaring rights. Further, I agree that no such decree should be made unless the relief capable of being given is consequential relief. The mere fact that some infringement of the proprietary right or title may have taken place, which, under certain conditions, might confer a right of suit for damages, is not enough to support a suit of this description.

The defendant in the suit is a creditor of the late Zemindar of Shevagiri. His debt was not a charge on the estate, but he became a purchaser at a sale held in execution of money decrees of the rights and interests of the deceased Zemindar.

This purchase was subsequent to the succession to the estate of the plaintiff in the suit, who is the son of the late proprietor, and it has been considered, I think rightly, that at the utmost the purchaser acquired only the right to certain arrears of rent and no present right in the estate.

The plaintiff is in full possession of the estate. He states in his plaint "Since (December 1873) the whole of the zemin has been completely in the enjoyment of the plaintiff." Being then unable to ask for relief in respect of his possession, he states the following as the ground of his suit: "By reason of the purchase at the above auction, the defendant has denied the right of the plaintiff to enjoy the zemin, and asserted that he himself is entitled to all the rights to the zemin; and by issuing orders to the Karnams and other officers and the ryots of the zemindary, and by publishing certain proclamations, has done acts calculated to affect the rights of plaintiff prejudically, and to molest his peaceable enjoyment of the zemin."

"*The cause of action* is the issuing of orders and proclamations by the defendant on the 31st October and 21st November 1874 in opposition to the plaintiff's rights."

Nothing was proved against the defendant beyond the issue of orders to the Karnams and notices to the ryots. These orders were by the plaintiff's directions disregarded by the Karnams, who

continued to collect the rents in the usual way. As to the notices or proclamations to ryots, it is stated in the Lower Court's judgment that the plaintiff's witnesses proved "that to some extent a few ryots took advantage of his adverse claims, and, under color of the defendant's proclamations, either refused to take their puttas or withheld their rents."

Some of the ryots, it may be, took occasion to add this to other pretexts for refusing to pay rents and to accept puttas. This is the most that can be shown to result from the defendant's proceedings. His "brave and big words" clearly imposed on no one —not on the Courts, the Collector, the Zemindar, or the Karnams as the Judge himself finds—nor in fact on the ryots themselves.

It comes to this that the defendant has in various ways made and published vain assertions of his alleged right by purchase. I think upon the authority of the case cited (*the Rajah of Pachete's case*)‡ that from such assertions no right of suit like the present can arise. The suggestion that relief by cancelling the proceedings (that is the orders and proclamations) of the defendant is capable of being had is disposed of by the same authority. The cancellation of deeds, agreements, and other written instruments which may be vexatiously or improperly used is directed by Courts of Equity, but I am not aware that relief of the kind suggested, *viz.*, the cancelling of written notices, &c., is ever given.

As to the suggestion that relief by damages might be obtained, I think, even on the assumption that, in some possible view, the defendant may be liable to a suit for damages at the instance of the plaintiff, that this right to damages would not constitute a right to relief within the meaning of the section.

MR. JUSTICE HOLLOWAY.—I gave my reasons fully at the hearing, and will only express my great satisfaction that I have remained long enough in the Court to see the limitation, for which I gave my voice many years ago, at last put upon those declaratory decrees.

---

‡ *Raja Nilmony Singh Deo Bahadoor v. Kalee Churn Bhuttacharjee* 14 Beng L. R. 382, and Legal Companion, Vol III. p 271

CALCUTTA HIGH COURT.

The 20th, 22nd, 23rd and 27th March, and 10th April, 1876.

PRESENT:

Sir Richard Garth, *Kt Chief Justice* and Mr Justice Pontifex.

SHAM CHURN AUDDY* (Plaintiff) *Appellant,*

versus

TARENY CHURN BANERJEE (Defendant) *Respondent.*

Easement—Prescription—User—Limitation—Act (IX of 1871*)* s 27.

Where a plaintiff claims a right of way, it is no less consistent to suppose that he is the owner of the soil

The reason why a discontinuance of user defeats a right of easement is, that no one can be said to be in the open enjoyment of an easement who has purposely, and with the manifest intention of preventing the user of it, created some obstruction of a permanent character which renders the enjoyment of the easement so long as the obstruction lasts, impossible This is very different from the mere non-user for a time of an easement, which the owner might, if he pleased enjoy during every hour of that time, but which for some good reason, he does not care to enjoy, as for instance where the owner of a house ceases to use a way to it, because the house is for a time unoccupied, or where a farmer desists for a time from exercising a right of pasture, because he happens to have no pasturable cattle or because by reason of drought or some other cause the herbage is scanty or unwholesome

* *Vide* 1, Indian Law Reports, Calcutta Series p 422

HIGH COURT, N. W P.

The 29th May 1876.

PRESENT:

Sir Robert Stuart, *Kt, Chief Justice* and Mr Justice Pearson.

RAM AUTAR* and others (Judgment-Debtors,)

versus

AJUDHIA SINGH and others (Decree-holders.)

Execution of Decree—Act IX of 1871, *sch. II,* 167*—Limitation.*

An application for the partial execution of a joint decree by one of the decree-holders is not an application according to law and consequently has not the effect of keeping the decree in force

---

* *Vide* 1, Indian Law Reports, Allahabad Series, page 231

Stuart, C. J.—The application of the 7th September, 1871, prayed only for the partial execution of the decree and had not therefore the effect of keeping the decree alive for the other defendants. The same may be said of the application of the 13th August, 1874. The application of 1871 itself is before me, and it is difficult to understand how any contention to the contrary could have been expected to succeed. It recites previous applications by Ajudhia Singh in conjunction with other defendants, and also the judgment of the Privy Council, and it then proceeds .—" As the other persons do not join me in executing the decree, and in the decree the first Court's costs are separately entered in my name, while the costs of the Sudder Court, amounting to Rs 969-12-0, are entered in my name and in those of the other persons collectively, who do not join in executing the decree, I apply for execution in respect of a 1-11th share, leaving out 10-11ths, the share of the said persons, and pray that it may be realized from the judgment-debtors." The application of 1874 appears to have been in similar form; and terms more carefully and precisely restricted to the applicant's own share could scarcely have been used, and how, in the face of them, the Subordinate Judge could have issued his orders of the 8th and 28th September, 1871, is, to say the least of it, not very intelligible.

This decree is a joint decree, and no application for its partial execution could keep it alive for the defendants as a body; and Ajudhia Singh's applications of 1871 and 1874, having been confined to his own individual interest in it, in the very clear and unmistakeable terms to which I have adverted, could not be availed of so as to bring the present application within the three years. The order therefore recognising and proceeding upon it cannot stand. The appeal must be allowed, and with costs.

(Pearson, J., gave a concurrent judgment)

BOMBAY HIGH COURT.

The 28th September, 1875

PRESENT.

Mr Justice Green

DAYAL JAIRAJ* Plaintiff,

versus

JIVRAJ RATANSI and another, Defendants.

Equitable Mortgage—Vendor and Purchaser.

The reason for the rule of equity, that a purchaser of property, though for valuable consideration, and taking the legal estate, yet with notice of a prior incumbrance, purchases subject to such incumbrance, is that such purchaser is acting *malâ fide* in taking away the right of the prior incumbrancer by getting the legal estate, while knowing that a prior purchaser has the right to it. But a purchaser for valuable consideration, without notice of the prior right of a third person, is not guilty of, or party to, a fraud upon the rights of a prior purchaser. The Court of Equity, therefore, will not interfere with his right to the possession, enjoyment and disposal of the property, and though, subsequently to his purchase, he may become aware of the prior incumbrance, yet he has the right to convey to a subsequent purchaser who at the time of such subsequent conveyance has notice of the prior right of the third person, and such subsequent purchaser will take the property free from the incumbrance; for neither is he guilty of any fraud in accepting what his vendor had a right to convey, nor would the *bonâ fide* purchaser without notice be able, otherwise, freely and completely to dispose of the property which he innocently acquired. On the same principle, any subsequent purchaser, however remote, though having notice, must be protected.

Where, therefore, the 2nd defendant, having notice of the plaintiff's equitable mortgage, purchased from one, who, also with such notice, had purchased from a *bonâ fide* purchaser, for value without notice,

Held that the 2nd defendant held the property free from the equitable mortgage.

GREEN, J, (In delivering judgment said) —Though the right of the plaintiff to call upon Jivraj Ratansi to execute a legal mortgage of the property, described or referred to in the agreement of 11th August 1865, depended on the plaintiff making a further advance of Rs. 27,000 to complete the Rs 65,000 agreed to be advanced, yet the deposit of the title deeds, though coupled with the expression in the agreement of the purpose of such deposit, as being to enable the plaintiff to get a proper mortgage deed prepared would, having regard to the fact that Rs. 38,000 had been already advanced on account of the Rs 65,000, amount in law to an equitable mortgage to secure the Rs. 38,000, so far as concerned the property comprised in the deeds deposited or any of them. *Keys* v. *Williams*,† *Hockley* v *Bantock* ‡

* *Vide* 1, Indian Law Reports, Bombay Series, p 287

† 3 Y, & Col 55 ‡ 1 Russ 141

Upon, or shortly after, 11th August 1865 the plaintiff delivered the agreement and the title deeds so deposited with him by Jivraj Ratansi to his (the plaintiff's) solicitors. He appears to have been advised by them that the title deeds were not in order, —in this respect particularly, that there was difficulty in identifying the properties mentioned in the agreement of 11th August 1865, or at least some of them, with the properties mentioned in the title deeds, and it was arranged that the deeds should be handed back to Jivraj with the view of clearing that difficulty. The plaintiff states that thereupon—the exact date, however, is not fixed—he told Jivraj Ratansi that he had been advised that the papers were not proper, or in order. He states that he said to Jivraj Ratansi, "You should, therefore, bring other papers. He said he would bring other papers. After this conversation, the same or the following day, the deeds were given back to Jivraj's partner, Amarji Hemje. Amarji was told the papers were not complete, or proper; that he should bring others, complete, or proper; and that thereafter a further sum of money should be paid" Amarji Hemji states that he received back the title deeds 10 or 15 days after the execution of the writing, *i.e.*, after 11th August 1865 All that this witness recollects as having been said to him on the occasion of giving back the deeds is, "The papers are not proper Do you give them over to your master (*i.e.*, Jivraj Ratansi). I was not told in what respect the papers were not proper." So the matter remained. No steps appear to have been taken by the plaintiff to cause Jivraj Ratansi to clear up the difficulties considered to exist, or to furnish further and better title, and the balance of the Rs. 65,000, viz. Rs. 27,000, was never advanced. The deeds so returned remained with Jivraj Ratansi, and the agreement of 11th August 1865 with the plaintiff's solicitors. The inaction of the plaintiff is, I think, reasonably explained by the circumstance that, during the latter part of August and the month of September 1865, his attention was taken up with a serious criminal charge which had been brought against him, and on which he was committed for trial to this Court, and on 30th September 1865 he was convicted and sentenced to transportation. The assertion of a still existing right to an equitable mortgage, over the property to which the agreement of 11th August 1865, and the title deeds deposited but returned, as agreed, purported to relate, seems to have been first made about November 1866, and then by

the Government Solicitor, who on behalf of Government, was engaged in procuring the execution of that part of the sentence, passed on the plaintiff, which ordered that the rents and profits of his moveable and immoveable property should be forfeited to Government during the period of transportation. In fact, Vallu Jairaj, the brother of the plaintiff, who, after the plaintiff was removed in February 1866 to the Andamans, acted as his attorney, does not seem to have been aware of the existence of the agreement of 11th August 1865, or of the deposit and return of the title deeds, till about October or November 1866, though he had become aware from the plaintiff's account books of the advances to Jivraj Ratansi of the sums of Rs. 15,000, Rs. 15,000, and Rs. 8,000 The plaintiff states that he was able and willing at any time to have made the further advance of Rs. 27,000, making up the sum of Rs. 65,000; but that previous to his conviction and confinement on 30th September 1865, Jivraj Ratansi never applied for the same.

On 3rd September 1866 Jivraj Ratansi conveyed to the late Bank of Bombay (amongst other things) the premises against which the alleged equitable mortgage of the plaintiff is, by this suit, sought to be enforced, by way of mortgage, to secure the sum of Rs. 26,355 then due and owing by the said Jivraj Ratansi to the said Bank, with interest at 10 per cent per annum, and the plaint states that he deposited with the Bank the title deeds of the said premises. It is not alleged in the plaint, nor is there a particle of evidence to show, that the Bank of Bombay, when they took the mortgage of 3rd September 1866, had notice, actual or constructive, of the alleged equitable mortgage of the plaintiff; and it will have been observed that the plaint itself states that on that occasion the title deeds were delivered to them by Jivraj Ratansi.

In the month of February 1867 the Bank caused the premises so mortgaged to them to be put up for sale by public auction, under the power in that behalf contained in their mortgage deed. At the auction, which was held on 15th February 1867, a notice was read aloud, and explained to those assembled at the sale, on behalf of the Government Solicitor, to the effect that the properties in Kazi Sayad Street, Nos. 8 and 9, then put up for sale, were subject to a lien, under the said agreement of 11th August 1865, and then vested in the Secretary of State, for the sum of Rs 38,000 advanced by the plaintiff to Jivraj Ratansi, and interest. It is stated in

evidence that one Sundardas Mulji and the defendant Gokuldas Madhavji were (amongst others) present at the said auction. As to Sundardas Mulji, there is no contradiction of the statement that he was present The presence of Gokuldas Madhavji, however, at this auction, which is deposed to by Vallu Jairaj, the brother of the plaintiff, and by Keshavji Jadhavji (who, though subpœnaed on behalf of the defendant Gokuldas Madhavji, and who is a maternal uncle of the plaintiff, was not called by either of the parties, but was called and examined by myself) was denied by the defendant Gokuldas Madhavji. Though I should be disposed to believe, in the circumstances of the case, had it been necessary to decide the point, that the defendant Gokuldas Madhavji *was* present at this sale, yet, for reasons which, hereinafter appear, it is not necessary to express any decided opinion on this matter The sale owing probably to the reading of the said notice, was not proceeded with.

On 24th April 1868 the Bank of Bombay, in exercise of their power of sale, conveyed the property in question in this suit to Sundardas Mulji in consideration of Rs 4,000 and in this conveyance the trustees, under Act XXVIII of 1865, of Jivraj Ratansi & Co, joined. Now whether or not Sundardas Mulji was present at the abortive auction of 15th February 1867, and heard the notice read, the evidence shows clearly that, before he completed his purchase, he had notice that Government, on behalf of the plaintiff, and as being interested in the rents and profits of his estate, claimed to have a lien, or charge, on the property, to secure the Rs. 38,000 advanced by the plaintiff to Jivraj Ratansi.

On 20th February 1872 Sundardas Mulji, in consideration of Rs. 7,000, conveyed the premises in Kazi Sayad Street, the subject of this suit, to the defendant Gokuldas Madhavji.

The case of the plaintiff, therefore, stands thus: He is entitled to an equitable mortgage on the house No. 9, in Kazi Sayad Street, the legal and apparent owner of such house being, at the time of the making of such equitable mortgage, the defendant Jivraj Ratansi Jivraj Ratansi fraudulently avails himself of the fact of having received back the title deeds, for the purpose of clearing up the supposed difficulties in his title, to mortgage the property to the Bank of Bombay, by a legal conveyance. The Bank of Bombay have no notice, at or before the time their mortgage was executed, of the fraudulent conduct of Jivraj Ratansi, or of the claim of the

plaintiff or the Government to have a charge in equity on the property, and they receive from Jivraj Ratansi the title deeds of the property. The Bank, in April 1868, sell and convey the property, for a valuable consideration, to Sundardas Mulji, who, however, had notice of the plaintiff's claim, and Sundardas Mulji, in February 1872 sells and conveys the property for a valuable consideration to the defendant Gokuldas Madhavji, who also, according to the plaintiff's case, had notice of the plaintiff's claim, by reason of his (the said defendant's) presence at the auction of February 1867 There is no other fact in evidence, except this alleged presence of Gokuldas at the auction, which goes to prove that, when he purchased from Sundardas in February 1872 he had notice of the plaintiff's claim. If, then, as he states himself, he was not present, the case of the plaintiff falls at once to the ground, as he would in that case be entitled to rely on the position of being himself a purchaser for valuable consideration without notice I am of opinion, however, that, even assuming the other alternative, which the plaintiff contends for, *viz*, that Gokuldas was present, to be true, the case of the plaintiff must fail, and for the following reasons —

The ground of the rule of equity that a purchaser of property, though for valuable consideration, and taking the legal estate, yet with notice of the prior right of a third person purchases subject only to the right of which he so had notice, is placed by Lord Hardwicke in the leading case of *Le Neve* v *Le Neve*[*] on this, that the taking of a legal estate, after notice of a prior right makes a person a *malâ fide* purchaser, that there is a kind of fraud on his part in this, that, knowing that a prior purchaser has the clear right to the estate, he takes away his right by getting the legal estate The Lord Chancellor states further that fraud or *malâ fides* is the true ground on which the Court is governed in cases of notice.

The earlier cases on the subject were chiefly cases where one conveyed the legal estate in landed property to another, by way of sale, mortgage, or settlement in consideration of marriage, but which property he had previously conveyed or charged, in favour of a third person, by a mode which, for want of a formal deed, or other defect, did not pass the legal estate. There the second purchaser, mortgagee, or object of the settlement, though taking the legal estate,

* Amb. 436, S C 3 Atk 646, 1 Ves. 64 2 Wh. & Tud. L. C 28

which had not previously passed from the vendor or settlor, and though giving a valuable consideration, yet was held to take the legal estate, only subject to any right of such third person of which he had notice at the time of paying the consideration or taking the conveyance. The act of the vendor or settlor, in conveying or charging property he had already conveyed or charged in favour of a third person, was held to involve a fraud on the right of that third person; and one who accepted a conveyance or charge from the vendor or settlor with notice of such prior right, though taking the legal estate, and giving valuable consideration, yet, by reason of the notice he had had of such prior right, was treated as an accomplice in the fraudulent conduct of the vendor or settlor, and as holding his estate subject only to the right of which he has had notice. But where a person for valuable consideration accepted a conveyance or charge, without any notice of the right of a third person, which rendered the act of the vendor or settlor in conveying or charging the property a fraud in contemplation of law, then, though the vendor or settlor may be guilty of a fraud, the purchaser is not his accomplice, and Courts of Equity have seen no ground for interfering with the position of advantage which his holding of the legal estate confers upon him, namely, the right to the possession, enjoyment, and disposal of the property. I say disposal, as it would be a very insufficient protection of such a purchaser's right to say he may hold the property undisturbed, but may not dispose of it to the best advantage. In other words, such a purchaser's conveyance to another of the legal estate, with its attendant advantages, is no more a fraud on the right of the third person, of which right he had no notice when the property was conveyed to him, and that, too, though he may have received notice of such right after his acquisition of the property, than was the acquisition itself by him of the property. And it is well settled that such a purchaser has the right to convey to one who, at the time of the property being conveyed to him, has notice of the right of the third person. In other words, though having notice, *he* protects himself by reason of taking from one who had no notice, and this by the necessity of protecting the right of free disposal by the latter. It may be considered that, though having notice, such a purchaser does nothing fraudulent in accepting what his vendor had a right to convey. The ground, however, generally given for

the principle that a purchaser with notice is entitled to protect himself under a conveyance from one who had no notice, is the very practical one already referred to; that to hold otherwise would be, possibly, seriously to impede, or even wholly to prevent, the *bonâ fide* purchaser without notice from disposing of his property at all Though, so far as appears, the precise question arising here, whether a purchaser with notice from one who also had notice, but had purchased from one who had no notice, is to be protected, as was his immediate vendor, by the right of the first vendor, has not arisen, yet I am of opinion, on a consideration of the authorities (many of which are cited in the notes to the case of *Le Neve* v *Le Neve**), that the ground on which a purchaser with notice is allowed to protect himself by reason of having purchased from one who had none, *viz*, the securing to the purchaser without notice the full benefit of what he had innocently acquired, must be held to protect a subsequent purchaser, however remote, though having notice I think the proposition in Kerr on Fraud, p 253, though not, of course, in itself an authority, is supported by the principles on which the cases on this branch of the rules as to notice are based, the proposition, namely, "The *bona fide* purchaser of an estate for valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party whose conscience stands bound by the meditated fraud If the estate becomes re-vested in him the original equity will attach to it in his hands" The case of *Carter* v *Carter*†, which in *Bates* v *Johnson*‡ is further observed upon and adhered to by the learned Judge who decided it, though not considered satisfactory by at least one of the Judges of appeal who decided the case of *Pilcher* v. *Rawlins*¶, was a peculiar one It was not concerned with the question what protection is to be given to an assignee, proximate or subsequent, from a purchaser without notice and, even if it cannot be said that the authority of the decision has been disclaimed by the Court of appeal, it is one of so peculiar a character, that it cannot in my opinion, govern the present case, which appears to be governed by well-settled rules and principles.

Without, therefore, expressing any opinion on several other points raised in defence, I am of opinion that, assuming that the

* 2 Wh & Tud 28. † 3 K & Johns 617 ‡ Johns. 316 ¶ L R. 7 Ch Ap 259

defendant Gokuldas Madhavji had, at the time of his purchase, notice of the plaintiff's equitable mortgage, yet that, deriving title under the Bank of Bombay, who were purchasers for value without notice, he holds the property in question free from the alleged right of the plaintiff as equitable mortgagee under the deposit of title deeds of August 1865. The decree is that the plaintiff's suit be dismissed with costs.

CALCUTTA HIGH COURT.

The 28th June, 1876

PRESENT:

The Hon'ble Sir Richard Garth, *Kt*, *Chief Justice*, and the Hon'ble Mr. Justice Mitter.

MONESSAR DASS* and another (Plaintiffs) *Appellants*,

versus

THE COLLECTOR AND MUNICIPAL COMMISSIONERS OF SARUN (Defendants) *Respondents*

Suit to set aside Municipal assessment—Finality of the decision of the Commissioners—Sections 26, 27, and 33 of Act III (B.C) of 1864.

Some actions may, no doubt, be brought against the Commissioners for a great variety of acts, which they may do under colour of their statutory powers, and under a mistaken view of their duties; but the Civil Court has no right to interfere with their assessment, regarding which their decision is declared to be final by section 33 of Act III (B. C) of 1864.

This was a suit brought by the plaintiffs, in the Court of the Munsiff of Saran, to obtain a reduction in the chaukidari tax assessed by the Municipal Commissioners, by setting aside their order rejecting the objections taken by the plaintiffs.

The defendants contended that no suit would lie against such an order.

The Munsiff decided that a suit would lie, and decreed the case on the merits; but the District Judge, on appeal, held that under Section 33 of Act III. of 1864 (B. C.), no such suit would lie, and he accordingly decreed the appeal, and dismissed the suit with costs.

Against this decision the plaintiffs appealed.

---

* *Vide* 1, Indian Law Reports, Calcutta Series p 409.

The judgment of the Court, delivered by Garth, C. J., was as follows:—

We think there is no ground for this appeal, and speaking for myself I should be very sorry to think that there existed any doubt whatever about this question.

By the 26th Section of Beng. Act III of 1864, the Municipal Commissioners are empowered to impose certain rates on houses, buildings and lands, which rates are to be paid by the owners, and by the 27th Section, those rates are to be assessed according to what may be considered the fair annual value of the property.

When the valuation is completed, lists are to be made, showing the rates at which each property is assessed; and when the assessment is made for the first time or increased, a special notice is to be given to the owner and occupier, of the amount at which the property is assessed, and an appeal is then given against the assessment, which, by the terms of Section 33, is to be heard before not less than three of the Municipal Commissioners. If an appeal is not made against the assessment, the assessment itself is final. If an appeal is made against the assessment, the adjudication of the Commissioners upon that appeal is also final, and in order more effectually to secure the finality of the adjudication, there is a special provision in the same section, that no person shall contest any assessment in any other manner than by appeal as hereinbefore provided.

Now, in this case, the plaintiff is attempting, by means of a civil suit, to reopen the question of the assessment of his house, which has been heard on appeal, and decided by the Municipal Commissioners. It is said that the Commissioners have tried the appeal in an improper way, and that they have exceeded their powers and acted contrary to the provisions of the Act. But even supposing that they had, the Civil Court has no right to interfere. Some actions may, no doubt, be brought against the Commissioners for a great variety of acts which they may do under colour of their statutory powers, and under a mistaken view of their duties, but not an action of this kind. Their decision upon an appeal against a rate assessment is absolutely final. The appeal is dismissed with costs.

HIGH COURT, N.-W. P.

The 1st June, 1876.

PRESENT.

Sir Robert Stuart, *Kt*, *Chief Justice*, Mr Justice Pearson, Mr. Justice Turner, Mr Justice Spankie, and Mr. Justice Oldfield.

AKHE RAM* (Plaintiff) *Appellant*,

versus.

NAND KISHORE (Defendant) *Respondent*.

Act XX of 1866, *s*. 53 *-Bond—Mortgage—Money-decree—Sale in Execution*.

The obligee of a simple mortgage-bond was only entitled, under Sec. 53, Act XX of 1866, to a money-decree.

Nothing passes to the auction purchaser at a sale in execution of a money-decree but the right, title, and interest of the judgment debtor at the time of the sale.

Where, therefore, a decree given under S 53, Act XX of 1866, declared the right of the obligee of a simple mortgage bond to bring to sale the hypothecated property, and such property was sold in execution of the decree, the auction purchaser could not claim in virtue of the lien created by the bond to defeat a second mortgage.

The following question was referred to the Full Bench by Turner and Spankie, J. J. :—

"Whether or not when property hypothecated in a bond is sold at auction in execution of a decree passed on the bond under the special provisions of s. 53, Act XX of 1866, the purchaser acquires merely the rights and interests of the judgment-debtor remaining at the time of the sale or can claim in virtue of the lien to defeat a second mortgagee."

STUART, C. J.—My answer to this reference is that a decree passed under s. 53, Act XX of 1866, is and can only be a mere money-decree, and that a sale in execution of such a decree can only give the purchaser the rights and interests of the judgment-debtor in the property hypothecated, and that such purchaser cannot claim in virtue of his lien to defeat a second mortgagee. I hold this opinion so clearly, and it is suggested to my mind so simply and directly by what I consider to be the true meaning of s. 53 of Act XX of 1866, and by the relative position of the two bond-holders, that I think it unnecessary to support it by any argument

* *Vide* 1 Indian Law Reports, Allahabad Series p. 236

or by any reference to authorities. The Calcutta and Madras cases referred to at the hearing* do not, in my opinion, apply.

(The other Judges gave concurrent decisions)

SHORT NOTES

CALCUTTA HIGH COURT.

Damages, Suit for—Joint undivided Proprietors—Revenue Sale—Act XI of 1859.

No suit for damages as between joint owners of undivided estates will lie in consequence of the sale of the whole estate through the default of one or more of such owners in paying their shares of the Government revenue

Vide 1, Indian Law Reports, Calcutta Series p 406 (Kemp and Pontifex, JJ) The 22nd February 1876 Lallah Ramessur Dyal Singh *vs* Lallah Bissen Doyal

Order on Receiver to sell—Attachment in Mofussil of Property in Hands of Receiver—Execution of Decree.

By a decree of the High Court obtained by D M in November 1871 in a suit on a mortgage brought by him against B C and P C, it was ordered that the suit should be dismissed against P C, that the amount found due on the mortgage should be paid to D M by B C; that the mortgaged property, some of which was in Calcutta and some in the mofussil, should be sold in default of payment, and any deficiency should be made good by B C The property in Calcutta was sold under the decree, and did not realize sufficient to satisfy the decree. D M, thereupon, in August 1873, obtained an order for the transfer of the decree to the Mofussil Court for execution: after the transfer B C died in December 1874, leaving a widow and an adopted son his representatives, against whom the suit was revived The decree, however, was returned to the High Court unexecuted

In a suit for partition of the estate of R C deceased, brought by P C against B C in the High Court, a decree was made in February 1871 for an injunction to restrain B C from intermeddling

* *Momtazooddeen Mahomed* v *Rajcoomar Dass* 14 B L R 408, S. C, 23 W R 187, *Ramu Naikan* v. *Subbaraya Mudali*, 7 Mad H C R 229

with the estate or the accumulations, and for the appointment of the Receiver of the Court as Receiver, to whom all parties were to give up quiet possession. B C was in that suit declared entitled to a moiety of the property in suit.

Held, on application by D M to the High Court for an order that the Receiver should sell the right, title and interest of the widow and son of B C in the estate in his hands to satisfy the balance of his debt, that D M was entitled to an order that their interest should be attached in the hands of the Receiver, and that the Receiver should proceed to sell the same.

Property in the hands of the Receiver of the High Court cannot be proceeded against by attachment in the mofussil.

Vide 1, Indian Law Reports, Calcutta Series p. 403 (Original Civil, Pontifex, J.) The 27th July 1876.—Hemchunder Chunder *vs* Prankristo Chunder.

Succession Act (*X of* 1865), *ss.* 4 *and* 44—*Husband and Wife—Parties with English Domicile married in India—Succession to Moveable Property.*

H M, a British subject, having his domicile in England, married in Calcutta, in April 1866, C, a widow, who at the time of the marriage had also an English domicile. C, after her marriage with H M, became entitled as next-of-kin to shares in the moveable properties of her two sons by her former marriage: these shares were not realized nor reduced into possession by C during her life. C died in 1872, leaving her husband, but no lineal descendants. In March 1874, H M filed his petition in the Insolvent Court, and all his property vested in the Official Assignee. In April 1875, letters of administration of the estate and effects of C were, with the consent of H M, granted to the Administrator-General of Bengal, by whom the shares to which C became entitled as next-of-kin of her sons were realized. In a special case for the opinion of the Court under Ch. vii, Act VIII of 1859, *held* that the domicile of the parties being in England, the English law was to be applied, and therefore the Official Assignee as assignee of the estate of H M was entitled to the whole fund realized by such shares in the hands of the Administrator-General.

S. 4 of the Succession Act does not apply in respect of the moveable property of persons not having an Indian domicile.

Vide 1, Indian Law Reports, Calcutta Series p. 412 (Markby J.) The 1st July, 1876. Miller *vs.* The Administrator-General of Bengal

***Act VI of* 1874 (*Privy Council Appeals Act*)—*Letters Patent*, 1862, *cl.* 39—24 *and* 25 *Vict*, *c.* 104, *s.* 9—24 *and* 25 *Vict.*, *c.* 67 (*Indian Councils' Act*), *s.* 22—*Power of Indian Legislature*.**

The provision in s. 5 of Act VI of 1874 that where there are concurrent decisions on facts, the case must, in order to give a right of appeal to the Privy Council, involve some substantial question of law, is not ultra vires of the power of the Indian Legislature as being a curtailment of the jurisdiction given to the High Courts by the Letters Patent, 1865, cl 39.

Clause 39 of the Letters Patent of 1865 does not rest for its authority on the 24 and 25 Vict, c 104, and was not inserted in pursuance of that Act; consequently any power which it gives to admit an appeal to the Privy Council from a decision of the High Court on its Appellate Side, is not one of the powers which the High Court is, by the first part of s. 9 of 24 & 25 Vict, c. 104, commanded to exercise,

S. 22 of 24 & 25 Vict., c. 67, must be read with ss. 9 and 11 of 24 & 25 Vict., c. 104. By the express words of s. 9 all previously existing powers were reserved to the High Court provided the Letters Patent did not interfere with them, and as to these powers the Governor-General in Council is expressly empowered to legislate. Even if therefore the power to admit an appeal to the Privy Council were conferred by the Letters Patent, under the authority of 24 & 25 Vict., c. 104, it was, not being a new power, subject to the legislative control of the Governor-General in Council.

The *ratio decidendi* in *The Queen* v. *Meares* 14 B. L R. p. 106 dissented from.

Where there were two concurrent decisions on facts, an application to appeal to the Privy Council was refused, the right of appeal from a decision of the High Court on its Appellate Side, simply on the ground that the subject-matter of the suit was above Rs. 10,000 having been taken away by Act VI of 1874, s. 5.

Vide 1, Indian Law Reports, Calcutta Series p. 431 (Markby, J) The 16th July, 1876. Feda Hossein and others

Madras High Court.

Adoption—Mother's Sister's Son—Sudras.

Adoption of the mother's sister's son is valid among Sudras. The rule prohibiting the adoption of one with whose mother, in her maiden state, the adopter could not have legally intermarried, is not binding on Sudras.

Vide 1, Indian Law Reports, Madras Series p 62 (Morgan C. J and Holloway, J.) The 22nd December, 1875. Chinna Nagayya *vs* Pedda Nagayya

---

Bombay High Court.

Registration Act VIII of 1871, *Section* 17—*Assignment of a decree for sale of Mortgaged Property.*

Where a mortgagee obtained a decree against his mortgagors for the payment of the mortgage moneys, and in default for the sale of the mortgaged property, and his heir afterwards executed an assignment of the decree, for valuable consideration, to the plaintiff, who proceeded to execute the decree by sale of the mortgaged property, *held* that the assignment was a document of which registration was compulsory.

Vide 1, Indian Law Reports, Bombay Series p 267. (Westropp, C J and Kemball, J.) The 8th August, 1876. Gopal Narayan *vs.* Trimbak Sadashio and another.

Hindu Law—Sale of ancestral property by Court—Son's interest in ancestral estate.

Under the Mitakshara and Mayukha, the son takes a vested interest in ancestral estate at his birth. But that interest is subject to the liability of that estate for the debts of his father and grandfather.

The ancestral property of a Hindu father may be sold either by himself or by a Civil Court having jurisdiction, in satisfaction of his debts, not contracted for illegal or immoral purposes, and such sale will bind sons *in esse* at the time of the sale. (14, B. L. R., p. 187 and 22, W. R., p. 56 followed.)

Vide 1, Indian Law Reports, Bombay Series p. 262 (Westropp, C. J., and Melvill, J.) The 27th July, 1876. Narayana Charya *vs* Narso Krishna.

Limitation—Act XIV of 1859, *Section* 1, *Clause* 16—*Act IX of* 1871, *Schedule II, Article* 129—*Declaratory decree—Suit to set aside adoption—Court Fees' Act No. VII of* 1870, *Schedule II, Article* 17, *Clause* 5—*Act VIII of* 1859, *Section* 15—*Consequential relief.*

B died, leaving him surviving two widows, K and R. Some time after B's death, P, a son, was born to R on the 15th September 1848. Some time before P's birth, a portion of B's *watan* lands had been made over to K by the Revenue authorities. The remaining portion of B's *watan* lands was placed by Government under sequestration, which was not removed until 1865. Shortly after P's birth, R petitioned the Revenue authorities, claiming the *watan* lands of B for P as B's son. On the 15th February 1849, the Revenue authorities on enquiry held that P was not the son of B, and decided that K was entitled to retain the *watan* lands of B. On the 16th March 1872, K adopted a son BA. In a suit brought by P on the 4th December 1872 for a declaration that he (P) was the son of B, and for setting aside the adoption of BA by K, BA and K contended that the claim was barred by limitation under Act XIV of 1859.

Held in special appeal that, the suit not being one to recover property but to set aside the adoption, was within time under that Act.

Held also that under the circumstances a suit for a declaratory decree would lie; for the plaintiff, even, if his claim to the property were barred as against K, would yet be entitled to obtain an injunction against any intervention of BA in performing the *shráddh* or other ceremonies for the benefit of B, or assuming the *status* of B's adopted son, and, moreover, the Legislature has in Act VII of 1870 and Act IX of 1871 recognized the right of a person to bring a suit to set aside an adoption as a substantive proceeding, independent of any claim to property.

Vide 1, Indian Law Reports, Bombay Series p. 248. (Westropp, C. J. and Nanabhai Haridas, J.) The 19th June, 1876. Kalova Kom Bhujaugrav *versus* Padapa Valad Bhujangrav.

Limitation—Act IX of 1871, *Schedule II, Clause* 85—*"Suit"*—*Rule* 149 *of the Common Law Rules of the late Supreme Court*—*Attorney and client*—*Bill of costs.*

An application (under Rule 149 of the Common Law Rules of the Supreme Court of Bombay) by an attorney, that his client should show cause why he should not pay the balance shown by the Taxing Master's *allocatur* to be due in respect of his bill of costs, and why, in default of such payment, attachment should not issue against the person and property of the client, is not "a suit" within the meaning of the Limitation Act IX of 1871.

Such an application as the above is not barred by any law of limitation now in force in British India.

Vide 1, Indian Law Reports, Bombay Series p 253 (Westropp, C J, and Sargent, J) The 15th July, 1876, Abba Haji Ishmail *versus* Abba Thira

---

HIGH COURT, N.-W P.

Act VIII of 1859, *s.* 260—*Execution of Decree—Certified Purchaser.*

A sued for a declaration that P, the certified auction-purshaser of certain immoveable property, was merely a trustee for R, A's judgment-debtor, that the purchase in P's name was made with the intent of defeating or delaying him in the execution of his decree, and that he was at liberty to apply for execution against the property as the property of his judgment-debtor.

* *Vide* 1, Indian Law Reports, Allahabad Series p 235 (Turner and Spankie, JJ) The 1st June, 1876 Puranmal *vs* Ali Khan

Public Thoroughfare—Obstruction—Jurisdiction—Act X of 1872, *s.* 521.

No suit for obstructing a public thoroughfare can be maintained in a Civil Court without proof of special injury.

Vide 1, Indian Law Reports, Allahabad Series, p 219 (Turner and Oldfield, J. J) The 9th June, 1876 Karim Baksh *vs.* Buddha

Bond—Mortgage—Money-decree—Sale in Execution—Condition against Alienation

Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title, and interest of the judgment-debtor at the time of the sale.

Where, therefore, the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree. The view of the Full Bench of the Calcutta High Court in *Momtazooddeen Mahomed* v. *Rajcoomar Dass* and the decision in *Ramu Naikhan* v. *Subbaraya Mudali* dissented from.

Held further that the holder of the money-decree in this case could not avail himself of a condition against alienation contained in his bond to resist the foreclosure. *Rajah Ram* v. *Bainee Madho* impugned.

Vide 1, Indian Law Reports, Allahabad Series, p 240. (Full Bench) The 9th June 1876 Khub Chaund *vs* Kalian Das

---

BOMBAY HIGH COURT.

The 6th June 1876.

PRESENT.

Mr. Justice Green.

MANIKLAL ATMARAM* *Plaintiff,*

versus

MANCHERSHE DINSHA COACHMAN, *Defendant,*

Right of suit as trustee—Suit to set aside the act of the former trustee—Validity of alienations by trustee.

A person cannot sue alone as trustee by purchasing the rights of other heirs who also are trustees. He might sue alone claiming a beneficial interest.

A suit by a trustee to disaffirm the completed act of a predecessor would not lie.

There is no such principle of law that the alienation of charity property by the trustees is, standing by itself, a breach of trust.

GREEN, J.—(In delivering judgment said):—The plaintiff does not, however, claim the property in question as beneficial owner. His case is that he is entitled to recover possession in his character of administrator *cum testamento annexo* of Bhugwan kulla. He

* *Vide* 1, Indian Law Reports, Bombay Series, p 269

professes to treat as still binding and operative the declaration in Bhugwan Kulla's will that this property is to be used for the temporary shelter and accommodation of any impersonation of Valabh (or Maharaj) who may arrive here, and he professes that, if possession of the property is awarded him, he will hold the property for that purpose. But, as I have said, I am unable to understand how merely in the character of administrator *cum testamento annexo*, the plaintiff can maintain this suit at all.

Nor can he, in my opinion, for the purpose of maintaining this suit, fall back upon and revert to his right, as an heir of the testator, to recover possession of the premises, admitting them to be subject to a trust. There are, as I have said, other persons, besides himself, who also fill this character and are not parties to this suit, and the fact that they have executed conveyances to him does not, in my opinion, give him the right to sue alone, where he sues as trustee, though, perhaps, it might have done so had he been claiming a beneficial interest. In the present case, however, the plaintiff expressly disclaims any such beneficial interest.

Independently of all this, there is, in my opinion, another objection to the plaintiff maintaining this suit, and an objection which would have been equally strong had the surviving heirs of Bhugwan Kulla been joined as plaintiffs. In whatever way the plaintiff's position is looked at, it comes to that of one, claiming to act as trustee under a will, seeking to undo an act of one who was also trustee under the same instrument. If Rajkuver had, in her life-time, filed a suit against the present defendant, saying, "True, I have conveyed this house to you (the defendant), and you have paid to me Rs. 13,000 as purchase-money, and have since laid out as much again upon it; but the conveyance by me was a breach of trust, and you had the means of knowing that it was so, and you must, therefore, restore me the property, and resign yourself to the loss of the purchase-money and expenditure." I apprehend such a suit would not be listened to. A trustee, as between himself and one to whom he has conveyed trust property, is, I apprehend, as much concluded by his own completed act as any other vendor. So, again, I apprehend, the completed act of a former trustee, though in itself a breach of trust, is as conclusive against a successor in the trusteeship, where it is the successor who, in a suit against one claiming under and by virtue of such act, is seeking to disaffirm

and annul it. We find, no doubt, cases of one trustee, who has been innocent of any breach of trust, suing a co-trustee, or the representatives of a deceased trustee, to restore property disposed of by breach of trust, or its value. There are also many cases to be found of *cestuis que trust* suing a trustee who has, in breach of his trust, disposed of property, and joining as defendant in such suit the party who has purchased the property with notice of the breach of trust. But in these cases the act sought to be annulled is not the act of the plaintiff or his predecessor in estate, and has no similarity to the case of a trustee seeking to disaffirm his own act, or that of a predecessor, as against the person claiming by virtue of such act. This difficulty in the plaintiff's way occurred to me early in the course of the hearing of the present case. The defendant's Counsel, in stating the case of the defendant, maintained that no precedent could be found of a suit of the nature of the present one, and the plaintiff's Counsel did not profess to have found any, though such precedent was called for early in the course of a hearing which lasted several days. Without saying anything as to the probable fate of this suit had it been instituted by the Advocate General on behalf of impersonations of Valabh visiting, or who might visit Bombay, it cannot, in my opinion, be maintained in its present form.

* * * * * * * *

There is another question worthy of consideration, and that is whether the sale of the property by Rajkuver (I say nothing of the application by her of the purchase money) was, in the circumstances of the case, a breach of trust at all. There is no such principle of law that the alienation of charity property by the trustees is, standing by itself, a breach of trust. The Court of Chancery in many cases authorizes such alienations, and according to Lord Langdale's judgment in *Attorney General* versus *South Sea Company*† "that which the Court might have done upon its own consideration of what would have been beneficial to the charity, might have been done by the trustees upon their own authority in the exercise of their legal powers." Looking at the circumstances of the present case and having regard to the principles to be found in a number of decisions of English Courts of Equity (of which I may mention

† 4 Beav. 453, see p. 448.

Attorney General *v.* Warner,‡ Attorney-General *v.* Pembroke Hall,§ Attorney-General v. Hungerford,|| and Attorney-General *v.* The South Sea Company,¶) I should have been inclined, had it been necessary in the present case distinctly to decide the question, to uphold the sale by Rajkuver as being a proper and reasonable exercise of her office as trustee and to have held it not to have been a breach of trust at all.

* * * * * * * *

SHORT NOTES.

CALCUTTA HIGH COURT.

Hindoo Law—Joint Ancestral Business—Debts incurred by Manager of Joint Family in trading.

A joint family property acquired and maintained by the profits of trade is subject to all the liabilities of that trade (1. Bom. H. C., App., 51, at p. 71, followed.)

Vide 1, Indian Law Reports, Calcutta Series, p 470 (Pontifex J.) The 19th June 1876. Johurra Bibee *v.* Sree Gopal Misser.

Agreement to refer to arbitration.

A suit will not lie to enforce an agreement to refer to arbitration even in the case referred to in the first exception to S. 28 of Act IX of 1872.

Vide 1, Indian Law Reports, Calcutta Series, p. 466 (Sir R Garth C. J. and Macpherson J.) The 6th September 1876 Coringa Oil Company *v* Koegler and others.

Small Cause Court Act (IX of 1850,) p. 42.—Power to restore case struck off for Default in appearance.

A Court of Small Causes, constituted under Act IX of 1850, can, during the same day, and at the same sitting of the Court, *ex parte* restore a cause once struck out under S. 42, though the order for striking off may have been duly recorded. In such a case, it would be open to the defendant to apply to set aside such *ex parte* order and the sufficiency of the grounds of the application would be a question for the discretion of the Judge.

Vide 1, Indian Law Reports, Calcutta Series, p 476 (Sir R. Garth, C. J. and Macpherson J.) The 31st August 1871. Sib Chunder Mullick *v.* Kissen Dyal Opadhya.

---

‡ 2 Swanst 291,
§ 2 Sim. and St 441, S. C. 1 R. & M., 751.
|| 2 CL. and Fin 357
¶ 4 Beav. 453.

Declaratory Decree—Consequential Relief—Act VIII of 1859, *S.* 15—*Juridiction of Civil Courts.*

A granted a lease of his entire property to the plaintiff for a term of years, with power to enhance the rents and make settlements. Immediately after A executed a pottah in favor of B, covering a 'portion of the same estate, whereby B's rent was to remain unchanged for a period conterminous with the plaintiff's lease. In a suit by the plaintiff against B and A's representative to have the pottah set aside, it was objected that, inasmuch as the deed had not been as yet set up against the plaintiff, nor any injury shown to have been occasioned to him thereby, he had no cause of action: held that the suit was maintainable.

In laying down the rule that " a declaratory cannot be made, unless there be a right to consequential relief," the Privy Council did not intend to deny to the Courts of this country the power to grant decrees in any case in which, independently of the provisions of Act VIII of 1859, s. 15, they had the power to grant a decree. This power is generally the same as that of the Court of Chancery in England.

Vide 1, Indian Law Reports, Calcutta Seris, p. 456 (Markby and McDonell, JJ.) The 3rd July 1876 Ram Needhee Koondoo *vs.* Rajah Rughoo Nath Narain Mullo.

Act X of 1872, *S.* 471—*Order sending case to Magistrate for enquiring into offence of giving false evidence.*

In a Civil suit the Judge directed the depositions of two witnesses, together with the English memoranda of their evidence to be sent to the Magistrate with a view to his enquiring whether or not they had voluntarily given false evidence in a judicial proceeding and further directed the Magistrate to enquire whether or not the plaintiff had abetted the offence of giving false evidence, *held* that under S. 471 of Act X of 1872 the Judge has no power to send a case to a Magistrate except when, after having made such preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (*i. e.* ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a specific charge, and that the Judge is bound to indicate the particular statements or averments in respect of which he considers that there is ground for a charge into which the Magistrate ought to enquire,

and that the order was bad because the Judge had made no preliminary enquiry and because it was too vague and general in its character.

Vide 1, Indian Law Reports, Calcutta Series, p 451 (Macpherson and Morris J. J.) The 23rd August 1876, the Queen *versus* Baijoo Lall and others.

BOMBAY HIGH COURT.

Limitation—Act XIV of 1859—*Act IX of* 1871, *Section* 22 *and Schedule II, Article* 60—*Evidence—Onus probandi—Proof of payment—Misjoinder.*

On the 2nd August 1872, A. K. filed a plaint against M. H and M. R., in which he alleged that on the 1st April 1870 M. R. had given a *hundi* for Rs 500, for value recieved, to A. K., that on 27th March 1871 M. H. purchased this *hundi* from A. K., promising to pay him Rs 531 for it; that M. H. gave the *hundi* to his brother I. H., for the purpose of obtaining payment of the amount from M. R., and that I. H. subsequently informed A. K. that the hundi had been lost. A. K. accordingly prayed that the defendants M. H. and M. R. might be decreed to pay to him Rs 534 with profit and interest. M. H. denied that he had purchased the *hundi* from A. K. who, he alleged, had given the hundi to I. H. for the purpose of getting it cashed. M. R. admitted that he had executed the *hundi*, and had given it to A. K. for Rs 500. He further alleged that it had been presented to him for payment by I. H, to whom he had paid the amount with interest on 31st March 1871, and he produced the *hundi* with a receipt purporting to be by I. H, indorsed on it. The trying Judge, after settlement of issues, on the 25th June 1874, added I. H., as a party defendant. I. H. alleged that A. K. had given him the *hundi* for the purpose of getting it cashed, denied the payment by M. R., alleged the indorsement on the *hundi* to be a forgery, and pleaded limitation.

Held, that the admission by M. R. of the drawing of the *hundi* for value received, laid on him the burden of proving payment, and that, though the possession by M. R. of the *hundi* was a circumstance in his favour, yet, as it did not in itself amount to proof of payment, the *onus probandi* was not thereby shifted to the plaintiff.

Held also, with reference to S. 22 of Act IX of 1871, that the law of limitation applicable to the suit, so far as I. H. was concerned was Sch. II, Article 60 of that Act, and that, therefore, if the payment by M. R. to I. H. were not proved to have been made within three years before 25th June 1874, the day on which I. H. was added as a defendant, the suit as against him was barred.

(12. Bom. H. Rep. 87 and 7 Mad. H. C, Rep. p. 392 dissented from)

*Vide*1, Indian Law Reports, Bombay Series, p. 295 (Westroff C. J. and Nanabhai Haridass *J*), the 7th August 1876. Abdul Karim vs. Manji Hansraj and others—

Prescriptive Right—Regulation V. of 1827, *Section* 1, *Clause* 1 *—Limitation—Act XIV of* 1859, *Section* 1, *and Clause* 13*—Act IX of* 1871, *S.* 2 *Sch. I, and Schedule II, Article* 127.

In 1873, the plaintiff sued for his share in certain ancestral property in the possession of the defendant, and alleged that the latter had been united with him in estate. He, however, admitted that he had lived separate from the defendant for forty years previously to the institution of the suit, and that he had not, during that period, received any portion of the profits of the ancestral property. The defendant pleaded limitation. Both the Lower Courts held that the suit was governed by Act IX of 1871, Sch. II, Art. 127, and decreed in favour of the plaintiff, on the ground that no demand by the plaintiff of his share and refusal to comply therewith had been proved.

Held by the High Court in Special Appeal that the defendant had acquired under Regulation v. of 1827, Section 1, Clause 1, a prescriptive title in the immoveable estate sued for, by his uninterrupted possession as proprietor for more than thirty years before Act IX of 1871 came into force, and that, therefore, the plaintiff's claim was barred, the effect of that Regulation being not only to bar the plaintiff's remedy but to take away his right.

The repeal of a statute or other legislative enactment cannot, without express words, or clear implication to that effect, in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force.

And, accordingly, although Act IX of 1871, S. 2, Sch. I, expressly repealed Regulation v. of 1827, it did not affect any prescriptive

right or title which had, under section 1 of that Regulation, been acquired before Act IX of 1871 was passed.

Vide 1, Indian Law Reports, Bombay Series, p 286 (Westroff, C. J. and Melvill J.) The 3rd August 1876. Sitaram Vasudev *vs* Khanderav Balkrishna.

HIGH COURT N. W. P.

Act IX of 1871, *S.* 5. b.—*Appeal—Limitation—Sufficient cause.*

A certain suit was dismissed on the 26th July, 1875, on which day the plaintiff applied for a copy of the Court's decree. She obtained the copy on the 31st July and on the 31st August, or one day beyond the period allowed by law, she presented an appeal to the Appellate Court. She did not assign in her petition any cause for not presenting it within such period, but alleged verbally that she had miscalculated the period. The Appellate Court recorded that it should excuse the delay, and admitted the appeal.

Held, that there was, under the circumstances, no sufficient cause for the delay.

An Appellate Court should not admit an appeal after the period of limitation prescribed therefor without recording its reasons for being satisfied that there was sufficient cause for not presenting it within such period.

(For circumstances constituting sufficient cause see 4, B. L. R. App., 84; 13 W. R., p. 245; 10 Bom. H. C. Rep 397.)

Vide 1, Indian Law Reports, Allahabad Series, p. 250 (Turner and Oldfield, J J) The 16th June 1876. Zaibulnissa Bibi *vs*. Kulsam Bibi.

Act VIII of 1859, *S.* 7.

The fact that, at the time when the purchaser of certain lands sued, with a view of confirming his little to the lands under his purchase, for a decree declaring such title, he was in a position to have sued for possession of the lands, was no bar under the provisions of S. 7. Act VIII of 1859, to his subsequently suing for possession of the same.

Vide 1, Indian Law Reports, Allahabad Series, p 252 (Turner and Spankie J. J.) The 26th June 1876—Tulsi Ram *vs*. Ganga Ram.

Act XVIII of 1873.—*Act IX of* 1871, *S.* 15—*Limitation.*

Semble, that the provisions of S. 15, Act IX of 1871, are not applicable to suits or applications under Act XVIII of 1873.

Vide 1, Indian Law Reports, Allahabad Series, p. 254, (Turner and Spankie J. J.) The 26th June 1876—Timal Kuari *versus* Ablakh Rai.

Hindú Law—Adoption—Inheritance.

An adopted son, under the Dattaka Mimansa and Mitakshara, succeeds to property to which his adoptive mother succeeded as the heiress of her father.

Vide 1, Indian Law Reports, Allahabad Series, p. 255. (Full Bench) the 28th June 1876. Sham Kuar *versus* Gaya Din.

Act VIII of 1859, *S.* 336—*Appeal when instituted—Memorandum of Appeal—Limitation.*

Where, under the provisions of S. 336, Act VIII of 1859, a memorandum of appeal is returned for the purpose of being corrected, the Appellate Court should specify a time for such correction.

Where an appellant presented an appeal within the period of limitation prescribed therefor, and the Appellate Court returned the memorandum of appeal for correction without specefying a time for such correction, the appeal again presented some days after the period of limitation was presented within time, the date of its presentation being the date it was first presented.

Vide 1, Indian Law Reports, Allahabad Series, p. 260. (Turner and Spankie J. J.) The 29th June 1876, Jagannath *versus* Lalman.

Act XVIII of 1873, *S.* 93, *Cl.* (h)—*Suit for profits—Interest.*

A Court of Revenue is competent, in a suit for profits, under S. 93, cl., (h) of Act XVIII of 1873, to award the interest claimed on such profits.

Vide 1, Indian Law Reports, Allahabad Series, p. 261. (Turner and Spankie, J. J.) The 29th June 1876—Totaram *vs.* Sher Singh.

Hindu Law—Hindu Widow—Family Dwelling-house—Right of Residence.

A Hindu widow, who resides with her husband and the members of his family in the family dwelling-house while he is alive, is entitled to reside therein after his death, and cannot be ousted by the auction-purchaser of the rights and interests in the house of her husband's nephew. (See 4 B. L. R. O. J. 72; 12 W. R. 35.)

Vide 1, Indian Law Reports, Allahabad Series, p. 262 (Turner and Spankie, J. J.) The 29th June 1876. Gouri *vs.* Chandramani.

Act IX of 1871, *S.* 5, *a—Institution of Suit—Limitation.*

Held, that where the period of limitation prescribed for a suit expired when the Court was closed for a vacation, and the Court, instead of re-opening after the vacation on the day that it should have re-opened, re-opened on a later day, and the suit was instituted when it did re-open, it was instituted within time.

Vide 1, Indian Law Reports, Allahabad Series, p. 263 (Spankie and Oldfield, J. J.) The 30th June 1876. Bishan Chund *vs.* Ahmad Khan and others.

Decree—Judgment—Appeal.

The plaintiffs in this suit claimed, as the heirs of G, possession from the defendants of certain lands which G had mortgaged to the defendant, alleging that the mortgage-debt had been satisfied from the usufruct. The defendants denied the title of the plaintiffs to redeem, asserting also that the mortgage-debt had not been satisfied. The Court of first instance held that the plaintiffs were entitled to redeem, but dismissed the suit on the ground that the mortgage-debt had not been satisfied. *Held*, that the defendants were entitled to appeal.

Vide 1, Indian Law Reports, Allahabad Series, p. 266 (Turner and Spankie, J. J.) The 7th July 1876. Ram Gholam *vs.* Sheo Tahal.

NOTICE.

The Proprietor of the LEGAL COMPANION will esteem it a favor if those subscribers who have not already paid up their subscriptions will do so without delay, as otherwise they will either be charged at the rate of Rs. 6 per annum or the supply of the journal will be discontinued to them.

SERAMPORE,
The 15*th May*, 1877.

Advertisement.

The public are hereby informed that any one publishing any law journal or law book under the title of the LEGAL COMPANION without my authority will be prosecuted for infringement of my copyright of that title. Baboo Kumud Nath Dutt, Sheristadar of the Board of Revenue, Calcutta, lately commenced to publish a work in parts under the title of the LEGAL COMPANION, without my authority, and when he was threatened with prosecution, he wrote, among others, the following letters and acting advisedly refrained from further using the said title.

SERAMPORE,
The 15*th May*, 1877.

PROSUNNO COOMAR SEN.

BOARD OF REVENUE,
Calcutta,
25*th March*, 1877.

MY DEAR SIR,

I have since determined to call my work by the name of the LEGAL GUIDE and not the PEOPLE'S LAW BOOK as was intimated to you in my last, and to this I hope you have no objection. I have satisfied myself by an enquiry that neither of these titles is registered under the Copyright Act. The fourth number of my work will be out of press on the 28th instant under that title.

A reply by return of post will highly oblige

Yours truly,
(Sd.) KUMUD NATH DUTT.

CALCUTTA,
3*rd April*, 1877.

MY DEAR SIR,

I am glad of the opportunity offered to me of presenting a copy of my work to you. The name of the book has been changed to THE LEGAL GUIDE, and a special notice has been attached to each copy, to prevent confusions in future. The subscribers and the public have been particularly told not to call my work under the old title which has been objected to by you.

May I take the liberty of asking you to be so good as to send me a copy of your valuable publication? Your article on the "Judicial Mind" is an excellent one.

Trusting this finds you in the enjoyment of perfect health,

Yours truly,
(Sd.) KUMUD NATH DUTT.

INDEX.

Court by which decided.	Names of Parties.	Subject of Case.	Pages.
Privy Council	Cowasjee Nanabhoy *vs.* Lallbhoy Vullubhoy and others.	Commission during Agent's Lifetime—Compensation ...	11
Ditto	Girdhari Singh *vs.* Hurdeo Narain Singh.	Waiver of Irregularity by Judgment-debtor —Act VIII of 1859, ss. 256, 257 ...	19
Calcutta High Court.	Deen Doyal Lall *vs.* Het Narain Singh.	Mortgage-Bond—Rate of Interest after due date	3
Madras High Court.	Case No. 1 of 1876 ...	Conveyance—Non-liability to additional duty as an indemnity-bond	2
N. W. P. High Court.	Darsan Singh *vs.* Hanwanta.	Registration—Bond of Rs. 99	1
Bombay High Court.	Muktum Valad Mohidin *vs.* Imam Valad Mohidin.	Res-Judicata. ...	27

THE

LEGAL COMPANION.

HIGH COURT, N.-W. P.

The 11th August 1876.

PRESENT:

Sir Robert Stuart, *Kt., Chief Justice*, and Mr. Justice Turner.

DARSHAN SINGH* and others (Defendants) *Appellants*,

versus

HANWANTA (Plaintiff) *Respondent*.

Act VIII of 1871 (*Registration Act*), *s.* 17, *cl.* (2)—*Registration—Mortgage.*

A bond which charges immovable property with the payment on a day specified therein of Rs. 99, the principal amount, and Rs. 6, interest thereon, should be registered under the provisions of cl. (2), s. 17, Act VIII of 1871.

JUDGMENT.—Assuming that the instrument creates a charge on immovable property, which may be doubted, it purports to create an interest over Rs. 100 in value, for it secured the repayment of Rs. 99 *plus* Rs. 6, the interest for three months. This was the least sum that could have been recovered under the instrument. The instrument not having been registered we cannot act upon it. Nor can we decree the debt apart from the lien, for the agreement should have been but was not registered, and more than four years had elapsed prior to suit from the date on which the agreement to repay the money was broken. This claim was therefore barred by limitation. The appeal is decreed, and, the decree of the Lower Appellate Court being reversed, the decree of the Court of first instance is restored with costs.

* *Vide* I. L. R. 1, All. p. 274.

MADRAS HIGH COURT.

The 15th August 1876.

PRESENT:

Sir W. Morgan, C. J., Mr. Justice Holloway, and Mr. Justice Innes.

Case No. 1* of 1876.

Stamp Act, XVIII of 1869—Conveyance—Non-liability to additional duty as an indemnity—bond.

Where a document, purporting to be a conveyance, and for only one consideration, contains words which merely express, though very informally, the usual covenants, for title which every properly drawn English conveyance contains, those words cannot be considered as constituting an indemnity bond, so as to render the document liable to stamp duty as an indemnity bond in addition to the stamp duty to which it is liable as a conveyance.

This was a case referred for the decision of the High Court under s. 41, Act XVIII of 1869, by the Board of Revenue in their Proceedings, dated 19th June 1876, No. 1,587.

The Court delivered the following

JUDGMENT.—We are of opinion that the document is liable to the stamp upon a conveyance only. The words supposed to constitute an indemnity bond are merely a very informal expression of the covenants for title which every properly drawn English conveyance contains.

The stamp for a conveyance covers these words because they are a well understood part of it.

S. 14 shows that a stamp, for each category, upon a document falling within two distinct categories, is required only where there is what is called a distinct consideration. Here there is unity of consideration, and the document, with the contractual words, fulfils the definition of a conveyance, and without them would not.

* *Vide* I. L. R. 1. Madras p. 133.

CALCUTTA HIGH COURT.

The 20th March 1876.

PRESENT:

Mr. Justice Kemp and Mr. Justice Birch.

DEEN DOYAL LALL* (Plaintiff) *Appellant*,

versus

HET NARAIN SINGH and others (Defendants) *Respondents*.

Mortgage Bond—Interest after due date, Rate of.

In a suit brought to recover the principal and interest due upon a written security given for the payment of the principal money on a day specified, with interest at a stipulated rate up to such day, the Court may, in its discretion, award interest on the principal sum from due date at such rate as it thinks fit, and is not bound to award such interest at the stipulated rate.

KEMP, J.—The plaintiff is the appellant in this case. He sued three sets of defendants to recover a sum of Rs. 8,088-8-6, due under a bond dated the 28th of Assin 1269 Fuslee, corresponding with the 17th of October 1861. The principal amount borrowed was Rs. 2,600, and interest is claimed from the 28th Assin 1269, the date of the bond, to the 28th Bysack 1281, date of suit, being twelve years and seven months, at the rate of Re. 1-8 per mensem. The total amount of interest claimed being Rs. 5,488-8-6. The bond was admitted by the principal defendants, the judgment-debtors. They were examined, and they also stated that, after the bond fell due, they were unable to pay it, and that they agreed to go on paying interest. The first defendants, are the purchasers of a portion of the property which was mortgaged to the plaintiff as security for the sum advanced by him to the principal defendants. The Subordinate Judge has given the plaintiff a modified decree for a sum of Rs. 2,875-9-6 out of Rs. 8,088-8-6 claimed. He has also made the plaintiff pay the costs of the defendants, and the result of the suit is, that although the bond is admitted, and the defendants depose that they were unable to pay, and asked for time, and promised to pay interest, they have to pay only about one-third of the amount claimed, and that the plaintiff has only to receive Rs. 2-5 in the shape of costs from the defendants. No wonder that, under these circumstances, the respondents did not appeal to this Court.

* *Vide* I. L. R. 2. Calcutta p. 41.

The Subordinate Judge has found that, as there is no stipulation in the bond regarding payment of interest after the appointed period for the discharge of the debt, the plaintiff is not entitled to interest after the lapse of that period. . . . . . The first objection taken before us by the appellant is, that the Court was wrong in not using its discretion, in overlooking the evidence of the debtor-defendants, and in not awarding interest from the date upon which the bond fell due up to the date of suit. The purchaser-defendants raised the following objection, that interest after the due date is not a charge upon the property hypothecated, inasmuch as any interest after that date is in the nature of damages, and more than six years having elapsed from the date on which the principal fell due, namely, in May 1862, the suit is barred.

We think that the Subordinate Judge is clearly wrong in not awarding interest at all from the date on which the bond fell due. The execution of the bond is admitted, and the bond-debtors admit in their evidence that they were unable to pay the debt on the date it fell due, and that they promised to pay interest from time to time. There is a case before the House of Lords, of *Cook* v. *Fowler* (1), in which it has been held that there is no rule of law that upon a contract for the payment of money on a day certain with interest at a fixed rate down to that day a further contract for the continuance of the same rate of interest is to be implied. . . . Lord Selborne, in his judgment, which is to be found at page 37, says :—"Although in cases of this class, interest for the delay of payment *post diem*, ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted, in an ordinary case of this kind, by a Court or jury, as the proper measure of damages for the subsequent delay; but that is because ordinarily a reasonable and usual rate of interest; which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to. But in the case before your Lordships, the agreed rate of interest is excessive and extraordinary; and although no question is raised between the present parties as to its fairness and reasonableness so far as it was matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by

the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time."

Now, applying the principle thus laid down to the present case, we do not think we should be justified in giving the plaintiff interest from the date on which the bond fell due at the rate of 18 per cent. per annum, the rate mentioned in the bond; but we think that, acting upon the discretion vested in us, we ought to allow the plaintiff interest at the rate of 6 per cent. per annum, which is the rate usually allowed by this Court, from the date on which the bond fell due. The plaintiff will therefore be entitled to recover Rs. 2,600 principal with interest at the rate of 18 per cent. per annum up to the date on which the bond fell due, and from that date at the rate of 6 per cent per annum up to date of payment.

We also think that the decision of the Court below with reference to costs must be modified. We therefore modify the decree of the Court below with reference to our remarks made above as to the interest payable to the plaintiff and the period for which that interest is to be paid, and as regards costs, we think that the plaintiff is entitled to his costs in this Court and in the Court below upon the sum now decreed as against both sets of defendants.

(1) L. R., 7 H. L., 27.

AN ELEMENTARY COURSE OF LAW LECTURES.

Lecture II.

On Succession—Will or Testament.

A Will or Testament is an instrument by which the devolution of an inheritance is prescribed. Inheritance is a form of universal succession. A universal succession is a succession to a *universitas juris*, or university of rights and duties. Inverting this order we have therefore to inquire what is a *universitas juris;* what is a universal succession; what is the form of universal succession which is called an inheritance? And there are also two further questions, which demand solution. These are, how came an inheritance to be controlled in any case by the testator's volition, and what is the nature of the instrument by which it came to be controlled?

The first question relates to the *universitas juris;* that is a university (or bundle) of rights and duties. A *universitas juris* is

a collection of rights and duties united by the single circumstance of their having belonged at one time to some one person. It is, as it were, the legal clothing of some given individual. It is not formed by grouping together *any* rights and *any* duties. It can only be constituted by taking all the rights and all the duties of a particular person. The tie which so connects a number of rights of property, rights of way, rights to legacies, duties of specific performance, debts, obligations to compensate wrongs—which so connects all these legal privileges and duties together as to constitute them a *universitas juris*, is the *fact* of their having attached to some individual capable of exercising them. Without this *fact* there is no university of rights and duties. The expression *universitas juris* is not classical, but for the notion jurisprudence is exclusively indebted to Roman law; nor is it at all difficult to seize. We must endeavour to collect under one conception the whole set of legal relations in which each one of us stands to the rest of the world. These, whatever be their character and composition, make up together a *universitas juris*; and there is but little danger of mistake in forming the notion, if we are only careful to remember that duties enter into it quite as much as rights. Our duties may overbalance our rights. A man may owe more than he is worth, and therefore if a money value is set on his collective legal relations he may be what is called insolvent. But for all that the entire group of rights and duties which centres in him is not the less a "juris universitas."

We come next to a "universal succession." A universal succession is a succession to a *universitas juris*. It occurs when one man is invested with the legal clothing of another, becoming at the same moment subject to all his liabilities and entitled to all his rights. In order that the universal succession may be true and perfect, the devolution must take place *uno ictu*, as the jurists phrase it. It is of course possible to conceive one man acquiring the whole of the rights and duties of another at different periods, as for example by successive purchases; or he might acquire them in different capacities, part as heir, part as purchaser, part as legatee. But though the group of rights and duties thus made up should in fact amount to the whole legal personality of a particular individual, the acquisition would not be a universal succession. In order that there may be a true universal succession, the transmis-

sion must be such as to pass the whole aggregate of rights and duties at the *same* moment and in virtue of the *same* legal capacity in the recipient.

When a Roman citizen *abrogated* a son, *i. e.*, took a man, as his adoptive child, he succeeded *universally* to the adoptive child's estate, *i. e.*, he took all the property and became liable for all the obligations. Several other forms of universal succession appear in the primitive Roman law, but infinitely the most important and the most durable of all was that one with which we are more immediately concerned, Hæreditas or Inheritance. Inheritance was a universal succession occurring at a death. The universal successor was Hæres or Heir. He stepped at once into all the rights and all the duties of the dead man. He was instantly clothed with his entire legal person, and we need scarcely add that the special character of the Hæres remained the same, whether he was named by a Will or whether he took on an intestacy. The term Hæres is no more emphatically used of the Intestate than of the Testamentary Heir, for the manner in which a man became Hæres had nothing to do with the legal character he sustained. The dead man's universal successor, however he became so, whether by Will or by Intestacy, was his Heir. But the Heir was not necessarily a single person. A group of persons, considered in law as a single unit, might succeed as *Co-heirs* to the Inheritance.

According to the Roman Law, "an inheritance is a succession to the entire legal position of a deceased man." The notion was that, though the physical person of the deceased had perished, his legal personality survived and descended unimpaired on his Heir or Co-heirs, in whom his identity (so far as the law was concerned) was continued.

In modern Testamentary Jurisprudence, as in the later Roman Law, the object of first importance is the execution of the testator's intentions. In the ancient law of Rome the subject of corresponding carefulness was the bestowal of the Universal Succession. One of these rules seems to our eyes a principle dictated by common sense, while the other looks very much like an idle crotchet. Yet that without the second of them the first would never have come into being is as certain as any proposition of the kind can be. In order to understand this clearly, we should notice one peculiarity

invariably distinguishing the infancy of society. Men are regarded and treated not as individuals, but always as members of a particular group. Every body is first a citizen, and then, as a citizen, he is a member of his order—of an aristocracy or a democracy, of an order of patricians or plebians; or, in those societies which an unhappy fate has afflicted with a special perversion in their course of development, of a caste. Next, he is a member of a gens, house, or clan; and lastly, he is a member of his *family*. This last was the narrowest and most personal relation in which he stood; nor, paradoxical as it may seem, was he ever regarded as *himself*, as a distinct individual. His individuality was swallowed up in his family. Primitive society, then, may be said to have for its units, not individuals, but groups of men united by the reality or the fiction of blood-relationship.

It is in the peculiarities of an undeveloped society that we seize the first trace of a Universal Succession. Contrasted with the organisation of a modern state, the commonwealths of primitive times may be fairly described as consisting of a number of little despotic governments, each perfectly distinct from the rest, each absolutely controlled by the prerogative of a single monarch. But though the Patriarch had rights thus extensive, it is impossible to doubt that he lay under an equal amplitude of obligations. If he governed the family, it was for its behoof. If he was lord of its possessions, he held them as trustee for his children and kindred. He had no privilege or position distinct from that conferred on him by his relation to the petty commonwealth which he governed. The Family, in fact, was a Corporation; and he was its representative or, we might almost say, its Public officer. He enjoyed rights and stood under duties, but the rights and the duties were, in the contemplation of his fellow-citizens and in the eye of the law, quite as much those of the collective body as his own. Let us consider for a moment, the effect which would be produced by the death of such a representative. In the eye of the law, in the view of the civil magistrate, the demise of the domestic authority would be a perfectly immaterial event. The person representing the collective body of the family and primarily responsible to municipal jurisdiction would bear a different name, and that would be all. The rights and obligations which attached to the deceased head of the house would attach, without breach of continuity, to his successor; for

in point of fact, they would be the rights and obligations of the family, and the family had the distinctive characteristic of a corporation—that it never died. Creditors would have the same remedies against the new chieftain as against the old, for the liability being that of the still existing family would be absolutely unchanged. All rights available to the family would be as available after the demise of the headship as before it—except that the Corporation would be obliged to *sue* under a slightly modified name.

It seems in truth, that the prolongation of a man's legal existence in his heir, or in a group of co-heirs, is neither more nor less than a characteristic of *the family* transferred by a fiction to the *individual.* Succession in corporations* is necessarily universal, and the family was a corporation. Corporations never die. The decease of individual members makes no difference to the collective existence of the aggregate body, and does not in any way affect its legal incidents, its faculties or liabilities. Now in the idea of a Roman universal succession all these qualities of a corporation seem to have been transferred to the individual citizen. His physical death is allowed to exercise no effect on the legal position which he filled, apparently on the principle that that position is to be adjusted as closely as possible to the analogies of a family, which, in its corporate character, was not of course liable to physical extinction.

Now in the older theory of Roman law the individual bore to the family precisely the same relation which a Corporation sole bears to a Corporation aggregate. The derivation and association of ideas are exactly the same. In fact, if we say to ourselves that for purposes of Roman Testamentary Jurisprudence each individual citizen was a Corporation sole, we shall not only realise the full conception of an inheritance, but have constantly at command the clue

* It has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate, or corporations : of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce ; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. The first division of Corporation is into *aggregate* and *sole.* Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever, of which kind are the mayor and commonalty of a city, the head and fellows of a college, &c. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation ; so is a bishop, &c. *Vide* 1, Blackstone, Chap. XVIII.

to the assumption in which it originated. It is an axiom that the King never dies, being a Corporation sole. His capacities are instantly filled by his successor, and the continuity of dominion is not deemed to have been interrupted. With the Romans it seemed an equally simple and natural process, to eliminate the fact of death from the devolution of rights and obligations. The testator lived on in his heir or in the group of his co-heirs.

When a Roman citizen died intestate or leaving no valid Will, his descendants or kindred became his heirs. The person or class of persons who succeeded did not simply *represent* the deceased, but, in conformity with the theory just delineated they *continued* his civil life, his legal existence. The same results followed when the order of succession was determined by a Will, but the theory of the identity between the dead man and his heirs was certainly much older than any form of Testament or phase of Testamentary Jurisprudence.

The conception of a universal succession, firmly as it has taken root in jurisprudence, has not occurred spontaneously to the framers of every body of laws. Wherever it is now found, it may be shown to have descended from the Roman law. According to Roman law, the original Will or Testament was an instrument, or (for it was probably not at first in writing) a proceeding, by which the devolution of the *Family* was regulated. It was a mode of declaring who was to have the chieftainship in succession to the Testator. When Wills are understood to have this for their original object, we see at once how it is that they came to be connected with one of the most curious relics of ancient religion and law, the *sacra* or family rites. These *sacra* were the Roman form of an institution which shows itself wherever society has not wholly shaken itself free from its primitive clothing. They are the sacrifices and ceremonies by which the brotherhood of the family is commemorated, the pledge and the witness of its perpetuity. Whatever be their nature—whether it be true or not that in all cases they are the worship of some mythical ancestor,—they are everywhere employed to attest the sacredness of the family relation; and therefore they acquire prominent significance and importance, whenever the continuous existence of the Family is endangered by a change in the person of its chief. Accordingly, we hear most about them in connection with demises of domestic sovereignty. Among the

Hindoos, the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. If the rites are not properly performed or not performed by the proper person, no relation is considered as established between the deceased and any body surviving him; the Law of Succession does not apply and no body can inherit the property. Every great event in the life of a Hindoo seems to be regarded as leading up to and bearing upon these solemnities. If he marries, it is to have children who may celebrate them after his death; if he has no children, he lies under the strongest obligation to adopt them from another family, "with a view to the funeral cake, the water, and the solemn sacrifice."

PRIVY COUNCIL.

The 20th and 21st June 1876.

On Appeal from Bombay High Court.

COWASJEE NANABHOY* (Plaintiff) *Appellant,*

versus

LALLBHOY VULLUBHOY and others (Defendants) *Respondents.*

Contract—Agency—Sale of the Subject of Agency—Commission during Agent's Lifetime—Compensation.

By an agreement, dated the 10th of June, 1857, the Appellant and others entered into a partnership for the purpose of establishing a factory for the manufacture of cotton twist; and thereby entrusted the whole management of the said factory to the Appellant during his life. The 4th clause thereof ran as follows "All we shareholders having agreed to make this settlement, that in return for the trouble you have been at in getting up this factory we have appointed you for your life the agent or broker of this factory, as to that it is to be understood as follows Whatever cotton may have to be purchased for this factory do you purchase; and whatever yarn may be made in this factory all that do you sell; and for whatever you may sell on account of the factory do you duly receive from this company the commission at the rate of 5 per cent. during your lifetime." A decree for dissolution and winding-up of the said co-partnership having been obtained by some of the co-partners on the ground that the same could not be carried on profitably; the Appellant contended that he was entitled to compensation in respect of his said engagement

Held, that there being no agreement by the co-partners to renounce their right of dissolution, or to pay compensation if they exercised such right, even if the partnership were originally intended to exist during the Appellant's life, the Appellant was not entitled to compensation.

* *Vide* 3, Law Reports, Indian Appeals, p 200.

Sir Robert P. Collier:—The circumstances under which this appeal arises are as follows.

On the 10th of June, 1857, *Cowasjee Nanabhoy* entered into an agreement with a number of persons, who were to form a partnership with him for the purpose of establishing a factory for the manufacture of cotton twist. As the terms of this agreement are very peculiar, it is as well to read *in extenso* the material parts of it. The beginning of the agreement is to this effect: "To *Parsee Cowasjee Nanabhoy Dawar*, written by us the undersigned, (who) do give in writing to you as follows:—You are establishing a factory for the manufacture of 'water' cotton twist. For the same there have been made 100 allotments, *i. e.*, 100 shares each; one share has been fixed at about Rs.3,000, *viz.*, three thousand. Relative to the same, we have given in writing to you this instrument, agreeably to the particulars written below. The first clause is this:—For the above-mentioned factory (ground is to be procured), and a building is to be erected, and machinery is to be sent for from *Europe*, and the same is to be set up here. In regard thereto, whatever business may have to be transacted, *i.e.*, the employment of persons, and whatever outlays may have to be made for the said factory, the whole management thereof, all we the undersigned shareholders having agreed, have intrusted to you that management, do you duly carry on during your lifetime, and the entire authority for signing and carrying on the entire management of the said factory belongs to you, and after the decease of you, *Cowasjee*, the whole of the shareholders are to approve of such agent or trustee as the shareholders, having held general meeting, may appoint." The second clause runs thus: "Out of the above 100 allotments, *i.e.*, shares as many shares as we have taken we have made known below in writing in the place of the signature of each of us, and at the time of signing this agreement, having paid you a deposit at the rate of Rs.500, *viz.*, 500 for each one share, a receipt bearing your signature was obtained." The third is in these terms: "For the above purpose, whatever may have been expended for a building and machinery. and whatever other outlays may have been made and may hereafter be made, all those we the shareholders are duly to pay in equal portions agreeably to our shares, the calls which you make in respect of the same as there may be need, we are duly to pay

within fifteen days' time. If within the said time of fifteen days we should not pay the amount of each call of those calls which you may make, then the share or shares subscribed by us shall become forfeited, *i.e*, there shall not remain on the part of those who may not pay the calls any right to the deposit to the amount of Rs. 500, *viz*, 500 paid per share, and the call or calls which may have been (already) paid, and the money paid for the same shall be credited to the profit account of this company; and hereafter should any shareholder of the shareholders who have signed below sell or make over his share or shares to any individual, the party or parties purchasing the same hereafter is or are also duly to act up to this agreement.". The fourth runs thus: "All we shareholders having agreed to make this agreement or settlement (*viz.*), that in return for the trouble you have been at in getting up this factory we have appointed you for your life the agent or broker of this factory, as to that it is to be understood as follows: Whatever cotton may have to be purchased for this factory do you purchase, and whatever yarn may be made in this factory all that do you sell; and for whatever you may sell on account of the factory do you duly receive from this company the commission at the rate of Rs. 5, *viz*.. 5 per cent. during your lifetime, but upon purchases you are not to receive anything from the company; yet on goods which you may purchase from merchants and sell, you yourself having received a percentage, also agreeably to custom, do you duly give credit for the same to this company," and so on. The fifth relates to sending for machinery on behalf of the company, and setting up the machinery, and so forth. The sixth relates to the calling of meetings, and the remaining provisions do not for the present purpose appear to be material.

Cowasjee took a number of shares in the company, some of which he held up to the time of the winding-up. He was undoubtedly a partner with these persons. He called up the full amount which was contemplated by this agreement, namely, Rs. 3,000 on each share, all the shares having been taken. Some time afterwards he called up another Rs. 1,000 on each share, and he also borrowed a sum of Rs. 1,50,000; he borrowed it indeed upon his own credit, but he charged it to the company, and he made another call of Rs. 500 per share. Upon this the shareholders became dissatisfied; meetings were called, and they came to the

conclusion that the company could not be carried on profitably with the capital which had been subscribed, or which they were bound to pay, and under these circumstances they filed a bill, praying, among other things, for a dissolution and winding up of the company. The order for the dissolution was made by the High Court of *Bombay*, and the reasons for making it are stated in the jugdment of the High Court, of which it is not necessary to read more than the following passage: "Supposing the partnership to be for a definite period, or one which is not dissoluble at the will of the majority of the members, we are of opinion that a state of things has arisen which requires the Court to decree a dissolution. It is impossible for the business of the company to be carried on without making further calls on the shareholders, the debt is accumulating, and it appears that even with the capital subscribed the business could not be carried on." An appeal was preferred against this judgment to the Queen in Council. The judgment was affirmed by the Queen upon the advice of this Board, but entirely without prejudice to the question whether or not *Cowasjee* was entitled to compensation. Subsequently the High Court of *Bombay* decided that he was not entitled to any compensation, and from this last decision the present appeal is preferred.

This question arises upon the construction of the contract. It is to be observed, as was properly called to their Lordships' attention by the counsel for the Appellants, that this is not a contract between master and servant, nor between principal and agent—at all events, not a contract pure and simple between principal and agent—but it is a contract between a partner and his co-partners. It is further to be observed that the remuneration of *Cowasjee* is not to be by salary, but by a commission upon sales. The distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission is obvious. The man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company, or even by its dissolution. He may be entitled to his fixed salary whatever may happen. But a man who agrees to be paid by a commission upon sales to a certain extent speculates on the prosperity of the company; the more the company sells the more he gets, the less it sells the less he gets, and if it sells nothing he gets nothing.

This distinction, which indeed is implied by the very terms used, is one which has been recognised in several cases which have come before the Courts.

The question is, whether from the whole of this agreement it is to be inferred, by necessary or reasonable implication, that all the co-partners of *Cowasjee* bound themselves to carry on the business at all hazards, or at whatever loss, at least during his life, or in other words whether they agreed to renounce their right of dissolving the company if they found that it could not be carried on except at a loss, or whether as an alternative to either of these two cases they agreed to pay him compensation. The part of the agreement which has been most pressed upon their Lordships is that contained in the 4th clause, wherein this is said (and indeed the same expression is used in the first clause), "You are to receive commission for what you sell on our account during your lifetime." Certainly it appears to their Lordships that the effect of this provision would be to give *Cowasjee* a right to commission during his lifetime, provided that the company was carried on and any commission was earned. It may also be contended, though it is not necessary to decide whether correctly or not, that these terms import an agreement that the partnership should be carried on at least as long as *Cowasjee* lived ; but that would not be enough for the Appellants, for they would have further to show that the partners relinquished the inherent right they would possess, notwithstanding that the partnership were established for the life of *Cowasjee*, or even for a definite term, of winding it up, or applying to have it wound up, in the event of its not being able to be carried on with success. This right is stated in Mr. Justice *Lindley's* book on Partnership, at page 243 of the last edition, in which he says: "In a more recent and more important case, however, the Court recognised the fact that expectation of profit is implied in every partnership, and held that if a partnership is entered into for a term of years, and the capital originally agreed to be furnished has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on, except at a loss, unless they do, the partnership will be dissolved by a Court of Equity. Under such circumstances as these it is unimportant whether the concern is already embarrassed or not. After everything has been done which was agreed to be done, and certain loss is the

only result of going on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time, and that time has not yet expired." So even putting it in the light most favourable for *Cowasjee*, that the partnership was originally intended to exist at least during the time of his life, it remains to be shewn that there is any provision in this agreement from which it can be fairly inferred that his co-partners relinquished the right which they would have of applying to the Court for winding up the business if it could not be carried on at a profit, or, in the event of their exercising this right, undertook to pay him compensation. In this case the company has been wound up on almost precisely the grounds which are indicated in Mr. Justice *Lindley's* book, and the other for winding up has been affirmed by this tribunal.

Their Lordships, after giving their best attention to the whole of this agreement, have come to the conclusion that by no fair and reasonable intendment can it be inferred that the partners relinquished their right of dissolving or applying to have the company dissolved under the circumstances mentioned, or that they agreed, if they did exercise this right, to pay *Cowasjee* compensation. For this reason they are of opinion that the case of *Cowasjee* fails.

Many cases have been called to their Lordships' attention, decided upon the terms of particular contracts, and more or less bearing upon the present, but inasmuch as the decision of thise case rests upon the words of this contract, which is of a very peculiar character, their Lordships do not think it necessary or advantageous to pass those cases in review. They think it enough to say that the conclusion they have come to, that no such term as has been contended for is to be imported into this contract, appears to them in conformity with the current of decisions which have been quoted, and more especially with the last case of *Rhodes* v. *Forwood,* decided by the House of Lords.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court of Bombay be affirmed, and that this appeal be dismissed with costs.

CONVEYANCES.—Stamp and Registration.

From January 1825 *to* 30*th September* 1860.

Under Beng. Reg. XVI of 1824 which was passed on the 18th November 1824 and was to come in operation after six weeks from the date of promulgation; as well as under Beng. Reg. X of 1829 which was in operation from 16th June 1829 up to 30th September 1860.

				Amount of duty. Rs. A.
Where the purchase or consideration money therein expressed or denoted shall not exceed			Rs. 50 ...	0 8
Above Rs.	50 and not exceeding	Rs.	100 ...	1 0
,,	100	,, ,,	200 ...	2 0
,,	200	,, ,,	500 ...	4 0
,,	500	,, ,,	1,000 ...	8 0
,,	1,000	,, ,,	2,000 ...	12 0
,,	2,000	,, ,,	3,000 ...	16 0
,,	3,000	,, ,,	5,000 ...	20 0
,,	5,000	,, ,,	8,000 ...	32 0
,,	8,000	,, ,,	12,000 ...	40 0
,,	12,000	,, ,,	20,000 ..	50 0
,,	20,000	,, ,,	30,000 ..	64 0
,,	30,000	,, ,,	50,000 ..	80 0
,,	50,000	,, ,,	100,000 ...	100 0
,,	100,000	,, ,,	200,000 ...	150 0
And for every further lack of rupees beyond two lacks			..	100 0

From 1st October 1860 to 31st December 1869.

Under Act XXXVI of 1860 as well as under Act X of 1862.

						Amount of duty. Rs. A.
When the purchase or consideration money therein expressed or denoted shall not exceed	...	...		Rs. 100	...	1 0
Above Rs.	100 and not exceeding		Rs.	200	..	2 0
,,	200	,,	,,	400	..	4 0
,,	400	,,	,,	800	..	8 0
,,	800	,,	,,	1,200	..	12 0
,,	1,200	,,	,,	2,000	...	20 0
,,	2,000	,,	,,	3,000	...	30 0
,,	3,000	,,	,,	4,000	...	40 0
,,	4,000	,,	,,	5,000	..	50 0
,,	5,000	,,	,,	7,500	...	75 0
,,	7,500	,,	,,	10,000	...	100 0
,,	10,000	,,	,,	20,000	...	150 0
,,	20,000	,,	,,	40,000	...	200 0
,,	40,000	,,	,,	60,000	..	300 0
,,	60,000	,,	,,	80,000	...	400 0
,,	80,000	,,	,,	100,000	...	500 0
And for every further		,,	,,	50,000	...	200 0
Or part thereof		,,	,,		..	100 0

Conveyances when the consideration is an annuity.	The same Stamp as for a Conveyance when the purchase money is equal to ten times the annuity.
Conveyances of any kind whatever not otherwise charged, if the value of the property conveyed or of the consideration for the Conveyance be stated or appear on the face of the Conveyance.	The same duty as would be charged if a consideration in money equal to such value were expressed in the Conveyance as the consideration thereof.
If no value appear on the face of the conveyance.	Fifty Rupees.

From 1st January 1870.

		Amount of duty.
	Conveyance	Rs. A.
Under Act XVIII of 1869.	When the amount paid or secured does not exceed Rs. 50	0 8
	When such amount exceeds Rs. 50 but does not exceed Rs. 100	1 0
	For every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1,000	1 0
	For every Rs. 500 or part thereof in excess of Rs. 1,000 up to Rs. 10,000	5 0
	For every Rs. 1,000 or part thereof in excess of Rs. 10,000 up to Rs. 30,000 ...	5 0
	For every Rs. 10,000 or part thereof in excess of Rs. 30,000 up to Rs. 100,000 ...	50 0
	For every Rs. 20,000 or part thereof in excess of Rs. 100,000	75 0

The registration of conveyances of immovable property of the value of one hundred rupees or upwards was made compulsory by Section 13, Act XVI of 1864 which came into force on the 1st January 1865 in the Presidencies of Bengal, Madras and Bombay, as well as by s. 17 of Act XX of 1866, and s. 17 of Act VIII of 1871.

PRIVY COUNCIL.

The 18th and 19th May 1876.

On Appeal from Calcutta High Court.

GIRDHARI SINGH*, (Plaintiff) *Appellant,*

versus

HURDEO NARAIN SINGH and others (Defendants) *Respondents.*

Material error in notification of sale in execution of Decree—Waiver of irregularity by judgment-debtor—Inadequacy of price.

Held, that, although the alleged inadequacy of price alone was no ground for refusing to confirm the sale, yet that the error in specifying the amount of Government revenue was an irregularity for which on proof of substantial injury to the judgment-debtor therefrom the sale might have been set aside, but that the petition of the judgment-debtor praying that a postponement for one month be granted *the attachment and the notification of sale being maintained,* amounted to an admission by him that the notification was correct, or that there was no such irregularity as would be likely to mislead.

* *Vide* 3, Law Reports, Indian Appeals, p. 230.

SIR BARNES PEACOCK :—(In delivering judgment said):—

Now the only material objection to the notification of the sale was that to which allusion has already been made, namely, that the sudder jumma was stated to be Rs. 3000 odd instead of Rs. 8000 odd. Section 249 directs that the notification of the sale shall state the amount for the recovery of which the sale is ordered specifying the time and place of sale, the property to be sold, and the revenue assessed upon the estate. Not specifying the amount of the revenue correctly was an irregularity for which the sale might have been set aside, provided the judgment debtor had satisfied the Court that he had sustained a substantial injury in consequence of it. The Subordinate Judge says that in the notification the sum of Rs. 3146. 11a. was specified in place of Rs. 8146. 11a., and that there is no doubt that the estate has been sold at a very low price. The High Court deals with that objection. They say, "What are the alleged irregularities?" One of the objections is the mistake with regard to the Government revenue which was payable upon the estate. Then they say: "The error as to the sudder jumma was, if an error at all, and of this there is no evidence, an error in favor of the judgment debtor, for if the sudder jumma was quoted at a lower figure in the proclamation than the recorded sudder jumma, it was not a material error likely to depreciate the bids, but rather to stimulate the bidders at the sale, for intending purchasers could refer to the towji; moreover, this objection was overruled by the Subordinate Judge." Their Lordships do not agree in this reason which was given by the High Court. If an estate is said to be held at a certain Government jumma, the auction purchaser may not know what the real value of the estate is, or what are the rents which are receivable from it. He may, perhaps, have had no opportunity before coming into the auction-room and bidding, to refer to the towji; if the Government revenue were stated to be much less than it realy was, he would suppose that the estate was a much less valuable one. In the ordinary mode of assessing the value of estates for the purpose of paying stamp duty or court fees upon the institution of a suit, it was formerly taken that three times the amount of the Government revenue of a permanently settled estate was a fair estimate of the value of the estate; but that was found to be much too low; and in the *Court Fees Act*, VII. of 1870, it was enacted that in assessing the value of estates for the purpose of suits, the value of

the estate should be taken as ten times the amount of the Government revenue; and in those cases in which there was no Government revenue, that fifteen years' purchase of the actual rents should be treated as the estimated value of the estate. Therefore it appears to their Lordships that the High Court was not correct in holding that the error was in favor of the judgment debtor; they think that the error might have been against the interest of the judgment debtor, and that if the sale had been confirmed, and he had proved that he had sustained actual damage by the irregularity, it would in an ordinary case have been a sufficient ground for setting aside the confirmation upon an appeal against it.

But their Lordships must look to another portion of this case. It appears that the sale was fixed for the 5th of August; that the judgment debtor applied to the Court to postpone the sale, and stated that he wished to raise the money, and added, "Under such circumstances it is prayed that a postponement of one month be granted, *the attachment and the notification of sale being maintained.*" Now the notification must have been stuck up at the Court House, and he must have had an opportunity of seeing what the real notification was; and if there was a clerical error in inserting Rs. 3146. 11a. as the Government revenue instead of Rs. 8146. 11a., he ought at that time to have made objection to the notification, and not to have consented to allow the notification to remain and be maintained as the notification under which the sale was to take place. Upon that petition an order was passed which was as follows: "It is ordered that the postponement be granted; that in case of non-payment of the decretal amount the property of the judgment debtor be sold, *without the issue of a second notification of sale,* on the 2nd September, 1872; and that a copy of the notification be suspended in a conspicuous place of the Court House." So that on the application of the judgment debtor himself the sale was postponed, he agreeing that the attachment and the notification of sale should be maintained.

Their Lordships think that the judgment debtor could not properly take objection to that notification by stating that there was an error in it. The petition amounted to an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to mislead. Under these circumstances, their Lordships think that the High Court was right in ordering the confirmation of the sale.

* * * * *

A CHAPTER FROM THE (NEW) CIVIL PROCEDURE CODE (ACT X OF 1877.)

CHAPTER I.

OF THE JURISDICTION OF THE COURTS AND RES JUDICATA.

No person exempt from jurisdiction by reason of descent or place of birth.

10. No person shall, by reason of his descent or place of birth, be in any civil proceeding exempted from the jurisdiction of any of the Courts.

Note.

This section corresponds with and is a reproduction of s. 4 of Act VIII of 1859 with slight difference in the wording only.

Courts to try all civil suits unless specially barred.

11. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Notes.

This section corresponds with s. 1 of Act VIII of 1859.

'Suits of a civil nature' referred to in this section mean all suits respecting the succession or right to real or personal property, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally all suits for the redress of any injury which a person may have sustained in his person or property.

The Civil Courts are, as a general rule, prohibited from interfering in any matter of a criminal nature which is cognizable by the ordinary criminal tribunals except in the case of contempt of Court.

There are some cases which have a criminal as well as a civil aspect, for instance, assaults, libels, adultery, criminal breach of trust, &c. The Civil Courts have jurisdiction in these cases, and the action will lie, notwithstanding that the Criminal Courts have

taken cognizance of the offence. The rule of English Law that an action cannot be brought for a tort amounting to a felony before the defendant has been prosecuted for the crime does not apply in India. The Court has only to see whether the suit is barred by any legislative enactment. 6, W. R. Civ. Ref. p. 9.

Before considering whether a suit is barred by any statute law, the question must be asked, whether the proposed action is to be taken with reference to a civil right, and whether the proposed suit is one of a civil nature, the general rule being that where there is a civil right there is a civil remedy,—that is to say, that the ordinary Civil Courts are the proper tribunals to which resort must be had for the enforcement of a civil right, and that no wrong of a civil nature shall be without a remedy in the Civil Court. 1, Smith's Leading Cases, p. 216.

The following are some of the legislative enactments barring civil suits :—

Section 1, Act XVIII of 1850 enacts that "No Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: provided that he, at the time, in good faith, believed himself to have jurisdiction to do, or order, the act complained of; and no officer of any Court, or other person bound to execute the lawful warrant or order of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the same."

Section 491 and 497 of this Code enacts that an award of compensation made for issue of attachment or arrest before judgment or for temporary issue of injunctions obtained on insufficient grounds shall bar any suit for damages for such arrest or attachment or injunction.

By Act XI of 1841, s. 2, it was enacted that * * * "actions of debt and other personal actions against native officers, soldiers, and other persons amenable to the Articles of War for the native forces in the military service of the East India Company, or resident within any station or cantonment, and carrying on any trade or business in a military bazar, shall be cognizable before a Military

Court, and not elsewhere, provided the value in question shall not exceed Rs. 200, and the defendant was a person of the description above-mentioned, when the cause of action arose, and when the suit was instituted: Provided that no suit shall be brought before any Military Court under this Act to determine any dispute of caste, or concerning any right to real property." *Vide* Beng. Reg. XX of 1825, Madras Reg. VII of 1832, and Bombay Reg. XXII of 1827.

By the Mutiny Act, 31. Vict. Cap. 14, s. 99, it was enacted that "In all places in India where any body of Her Majesty's forces may be serving, situate beyond the jurisdiction of any Court of Small Causes established by or under authority of the Governor-General of India in Council, actions of debt, and all personal actions against officers, or against persons licensed to act as sutlers, or other persons amenable to the provisions of this Act, not being soldiers, shall be cognizable before a Court of Request composed of military officers, and not elsewhere, provided the value in question shall not exceed four hundred rupees, and that the defendant was a person of the above description when the cause of action arose, which Court the commanding officer of any camp, garrison, cantonment, or military post is hereby authorized and empowered to convene, &c."

By statute 21, Geo. III, Cap. 70, it is declared that the Governor-General and Council of Bengal are not subject to the Supreme Court; s. 2 exempts persons from suits in that Court in respect of things done by them under the written order of the Governor-General in Council.

Act XXIII of 1863 (Waste Lands), s. 7, constitutes Courts for the trial of claims to waste lands under the Act; and s. 8 precludes any other Court from entertaining such claims. Vide also

Act V of 1866 (Bombay Council) s. 2.
,, XI of 1863 Ditto s. 14.
,, VI of 1851 Ditto s. 22.
,, VI of 1863 (Bengal Council) s. 226.
,, X of 1866 Ditto s. 71.
,, III of 1864 Ditto s. 87.
,, IV of 1866 Ditto s. 99.
Reg. VI of 1831 (Madras) s. 3.

The student is also referred to the paper on CAUSES NOT ACTIONABLE printed in No. 5 of Volume II of the Legal Companion.

Pending suits.

12. Except where a suit has been stayed under section 20, the Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, pending in the same or any other Court, whether superior or inferior, in British India having jurisdiction to grant such relief, or in any Court beyond the limits of British India established by the Governor-General in Council and having like jurisdiction, or before Her Majesty in Council.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

NOTES.

This section lays down the law as to *Lis Pendens.*

Section 20 of this Act is as follows :—"If a suit which may be instituted in more than one Court is instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly; and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them, &c."

Res judicata.

13. No Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under

whom they or any of them claim, litigating under the same title.

Explanation I.—The matter above referred to must in the former suit have been alleged by one party and either denied or confessed, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation IV.—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V.—Where persons litigate *boná fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI.—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.

NOTES.

This section corresponds with s. 2 of Act VIII of 1859. It is to a large extent founded on the definition in Livingston's Code of

Evidence. It deals with *res judicata,* and incidentally with foreign judgments.

"Between parties under whom they or any of them claim" means such parties as succeed to the rights of the parties to the first suit, by inheritance, purchase, gift, or other mode of transfer. The difference between s. 2 of Act VIII of 1859 and this section may be easily marked by noticing that by the former, Courts were directed not to "take cognizance of any suit brought on a cause of action which shall have been heard and determined," while in the latter, it is provided that "no Court shall try any suit or *issue* in which the matter directly and substantially in issue has been heard and *finally decided.*"

Res judicata is not a plea to the jurisdiction but a plea in bar.

The rule laid by s. 2 (Act VIII of 1859) must not be too widely construed, and the bar, if there be one, must be made out clearly, as every cause is entitled to be heard once, and if the Courts refuse to entertain a suit which has not really been heard before, injustice is committed (8, W. R. p. 125.)

A judgment which proceeds only upon a technical defect or irregularity, or upon a question of jurisdiction, or upon some special circumstances relating to the position of the parties, and not upon the merits of the case, or which expressly, or by implication, gives liberty to sue again, is no bar to a second suit (7 W. R. p. 97, 236; 3 Madras 84; 2 N. W. P. p. 104).

Though the former suit may have been dismissed because the plaintiff failed to produce evidence in support of his claim, yet the effect of the decision is the same as if judgment had been given after evidence had been adduced on both sides (1, W. R. 343; I. L. R., 1, Mad. p. 84.)

Explanation II is in accordance with a judgment of the Bombay High Court reported in 10, Bom. H. C. Rep. p. 293. *Maktum Valad Mohidin* v. *Imam Valad Mohidin.* The facts of this case were as follow:—Imam and Maktum are two brothers. In 1866 Imam sued Maktum for a moiety of the family property, movable and immovable, left by their father, to the amount of about Rs. 12,000. He admitted being in possession of about Rs. 1,000, and claimed Rs. 5,000 the remainder of the moiety. In this suit Imam obtained a decree for half a share in a house and two shops,

worth about Rs. 700, the rest of his claim was rejected. In the year 1871, Maktum brought a suit to recover a moiety of the property which he alleged Imam had fraudulently concealed and a moiety of certain other property which Imam in a former suit (which was instituted by him in 1864 but was dismissed) admitted he had been in possession of.

West, J. (with him Nanabhai, J.)—We are of opinion that although the decision, arrived at by the Assistant Judge, cannot be supported on the ground upon which he has placed it, yet the suit was barred by the suit of 1866, in which the present defendant, Imam, was plaintiff with the present plaintiff, Maktum, as defendant. That suit was brought after the death of their father, which occurred in 1862. Imam admitted the possession of a portion of the family estate, but sought still more. If what he sought was more than he was entitled to, Maktum might have urged that fact as a ground of defence. Either Maktum did not urge it or it was not sustained, for the judgment awarded to Imam a portion of the property that he sought. Maktum now comes forward to claim a partition, in his favor, of a portion of the same family property, on the ground that Imam holds more than his share. This was a matter which existed, if at all, at the time when the former suit was brought in 1866. Maktum had an opportunity of bringing it before the Court, and having lost that opportunity cannot now rest a new suit upon it: *Newington* v. *Levy* (L. R. 6, C. P. 193.) In answer to Imam's averment "You Maktum have an excess," he should have said "No; you Imam have an excess." The former decision implies that the excess was in the hands of Maktum, and he cannot now come forward on the ground that, instead of an excess, there was a deficiency. We, therefore, confirm the decree of the Court below with costs."

Explanation IV.—A former judgment, by a Court of competent jurisdiction, upon the same cause of action, is conclusive between the same parties in a subsequent suit brought in another Court, notwithstanding the pendency of an appeal against it; but the Judge passing the decree in the subsequent suit may, on application made to him, and security being given, stay the execution of it, until the appeal in the former suit is decided; and may, if the former decree is reversed, entertain an application for review of his own decision in the subsequent suit. 4, Bom. H. C. Rep. 81.

Explanation VI.—A foreign judgment is conclusive as between the parties, when it cannot be questioned upon the ground of fraud or want of jurisdiction, or that it was unduly obtained. 4, W. R. p. 108.

The following illustrations, which were given in the draft but omitted from the Act as unnecessary, might be consulted with advantage:—

Illustrations.

The following decisions shall cause the dismissal of a subsequent suit :—

(*a*). In a suit brought by one of the inhabitants of a village for the purpose of determining a right of way claimed by such inhabitants, a decree is made against him. Such decree shall bar all the other persons claiming the same right under the same title, but not if they claim under a different title.

(*b*). A sues B for a flock of sheep and obtains a decree. This is a bar to a subsequent suit by B against A for the flock, although the individual animals composing it may not be the same at the time of both suits, for the character of the whole matter in dispute is the same. *Vide* I. L. R., 1, Mad. p. 84.

(*c*). A sues B for a particular bigha of land. Decree is made in favour of B. A dies intestate and C obtains letters of administration to his estate. B dies testate leaving D his executor who proves his will. C cannot sue D under the same title for any part of the same land.

(*d*). A sues B for two separate pieces of land. Decree is made in favour of A, who sells the two pieces to C. B cannot afterwards sue C under the same title for either piece separately.

(*e*). A sues B for Rs. 1,000. The Court decides that this sum was never due to A. A then sues B for interest on the said sum. The decree in the former suit is a bar to this suit; for the subject of the second suit, though not identical with, is incident to, and involved in, the subject of the first.

(*f*). A sues B for a piece of land bordering on a river and obtains a decree. This decision is a bar to a subsequent suit by B against A for alluvial soil since added to the land, or for trees the growth of the land, or for rent or mesne profits in respect of its occupation, by virtue of the same title under which the land was claimed.

(*g*). In a suit by A against B respecting lights, the Court decides that the defendant has no right to raise his wall ten feet. This decision is a bar to a suit by B against A to enforce his alleged right to raise the wall twenty feet; for the thing demanded by the latter suit is so included in that which was decided in the former suit, that the decree in the latter suit must confirm or annul the decree in the former suit.

(*h*). A sues B on a written obligation for the payment of money. Decree is made in favour of B on the ground that the money claimed is not due. This is a bar to a subsequent suit by A against B for money claimed not on the written obligation but on the same transaction. *Vide* I. L. R., 1, Bom. p. 87.

(*i*). A sues B and C jointly for having together wrongfully fouled the water of a stream running through A's land, and obtains a decree against them. This is a bar to a subsequent suit by A against B separately for the same wrong, even though the decree in the prior suit has remained unexecuted.

(*j*). B and C jointly divert the water of A's watercourse. A sues B for the diversion, and the suit is dismissed. This is a bar to a subsequent suit by A against C for the same wrong.

(*k*). A and B, by their joint promissory note, promise to pay C Rs. 1,000. C sues them for non-payment of this sum, and obtains a decree against them. This a bar to a subsequent suit by C against A on the same note.

The following decisions shall not cause the dismissal of a subsequent suit :—

(*l*). An interlocutory order that a party shall account ; for this decision is not final.

(*m*). A decree passed by a subordinate Court under section 618 contingent upon the opinion of the High Court upon a point referred ; for this decision is not final.

(*n*). A decree of a Court of Small Causes under Act XI of 1865, for Rs. 1,001,; for this decision has not been given by a Court of competent jurisdiction.

(*o*). A decree of a like Court for the balance of a partnership-account, such balance not having been struck by the parties or their agents ; for such Courts have no jurisdiction to make such decrees.

(*p*). A decree of a Revenue Court in a suit for rent declaring the validity or invalidity of a bond : for such Courts have no jurisdiction to make such declarations. *Vide* 6, N. W. P. Rep. p. 77.

(*q*). A decree in a suit in which it appears on the face of the record that summons has not been served on the defendant or his agent, when the defendant or his agent has not expressly or impliedly waived the necessity of such service.

(*r*). A decree that the defendant pay the damages which the plaintiff sustained; for here the decision is uncertain, and is not rendered certain by any part of the record.

(*s*). A decree that the plaintiff shall recover such compensation as Z shall determine; for here the decision is not final.

(*t*). A decree in a suit for three hogsheads of sugar that the defendant pay, at the rate of Rs. 150 per hogshead, the sum of Rs. 460; for here the sentence is invalid, evident error appearing on the decree itself.

(*u*). A decree declaring that the defendant shall go quit of a debt demanded by the plaintiff, and which the defendant had confessed to be due in his written statement in the same suit; for here the decision is invalid as being contrary to the judicial confession of a party.

(*v*). A decree given against one not a party to the suit, or against a minor not properly represented by a guardian.

(*w*). A sues B for one bigha of land. The Court decrees that A shall recover three bighas. The defendant then sues A for the two additional bighas. The former decree is no bar, because it was not in a matter alleged by one party and denied by the other in the suit in which it was made.

(*x*). A's executor, B, sues C for property belonging to A's estate. It appears that C has no such property and a decree is thereupon made in his favour. Afterwards C gets possession of part of A's estate. The former decree is no bar to a subsequent suit by B against C.

(*y*). A sues B, C and D. Before the judgment, D's name is struck out of the proceedings. A decree afterwards given in the suit does not bind D, unless his name has been reinstated on the record and is thereon at the date of the judgment.

(*z*). A sues B and C. Before the judgment D's name is introduced as a party on the record by fraud and without his knowledge. A decree afterwards given in the suit does not bind D unless he has consented to becoming a party.

(*aa*). A obtains against B a decree declaring that A is the owner of certain land. This is no bar to a subsequent suit by B against A for a right of way over the same land.

(*bb*). A sues B to obtain a right to an easement for the passage of cattle. Decree is made in favor of B. This is no bar to a subse-

quent suit by A against B for a right of footway; for the easements are of different kinds.

(*cc*). A sues B for trespassing on his land. Decree is made in favour of B. This does not bar a subsequent suit by A against B claiming rent from him as tenant of such land.

(*dd*). A, as executor to B, sues C for certain land. Decree is made in favour of C. A may nevertheless in his own right sue C for the same land; for here the plaintiff in each suit does not prosecute in the same quality.

(*ee*). On the death of A a Hindu, B takes possession of A's land, claiming to hold it as A's adopted son. A's widow, C, sues B for possession as widow. B pleads the adoption. The Court finds that B was not adopted, and decrees in favour of C. On C's death, A's collateral kindred take possession of the land. The former decree does not bar a suit by B against them for possession as A's adopted son, for the collateral kindred do not claim under C.

When foreign judgment no bar to suit in British India.

14. No foreign judgment shall operate as a bar to a suit in British India—

(*a*) if it has not been given on the merits of the case:

(*b*) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India:

(*c*) if it is in the opinion of the Court before which it is produced contrary to natural justice:

(*d*) if it has been obtained by fraud:

(*e*) if it sustains a claim founded on a breach of any law in force in British India.

NOTES.

Foreign judgments, in order to be received as evidence or to be used as a bar to the institution of a suit, must finally determine the points in dispute, and must be adjudications upon the actual merits, and they are open to be impeached upon the ground that the foreign Court had no jurisdiction, whether over the cause, over the subject-matter, or over the parties, or that the defendant never was summoned to answer, or had no opportunity of making his defence, or that the judgment was fraudulently obtained. To deprive a foreign judgment of effect on the ground of want of jurisdiction, it is necessary to show that the defendant was not a subject of the foreign State, or resident, or even present in it at the time when the proceedings were instituted; and therefore that he could not be bound, by reason of allegiance or domicile, or temporary presence, by the decisions of its Courts; and further that the defendant was not the owner of real property in such State, for otherwise, since his property would be under the protection of its laws, he might be considered as virtually present, though really absent.

PRIVY COUNCIL.

The 30th November, 1876.

PRESENT :

Right Hon'ble Sir James Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from Calcutta High Court.

KONWAR DOORGANATH ROY, *vs.* RAM CHUNDER SEN

Dewutter Property—Secondary Evidence of a Deed—Impartible nature of property dedicated to an Idol—Shebaith—His Power—Alienation of Dewutter Property.

Where a property was dedicated to the service and worship of a particular idol, though the idol were a family idol, the property would be impressed with a trust in favour of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction.

Where mention is made of a deed in the rubicari of a Court, in a former suit, this much is held to be proved that a document was put forward at that time, but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

Where no witness has been called who ever saw a particular deed and the person who produced it in the former suit, when called in the subsequent suit does not refer to the deed, and the only search proved to have been made is a search made by a young clerk in the sherista of the zemindary who was not likely to have any knowledge of the deed, and who simply says that upon search he did not find it there,—*held* that under that state of things, it is very doubtful whether secondary evidence of the deed should be permitted at all.

Where a party contends that a property has been inalienably conferred upon an idol to sustain its worship, very strong and clear evidence of such an endowment should be given.

Where a mehal has been really dedicated to an idol, it is no longer a partible estate.

Where a party seeks to set aside a document 30 years old on the ground that it is collusive, he must show that the representation (of legal necessity) made in the deed was not believed by the grantees and that they colluded with the widow to put a pretended consideration. Unless the purchaser is aware at the time he makes the purchase, that the widow intends to apply the money to a different purpose from that stated in the document, he cannot be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose.

The position of a shebaith to an idol is analogous to that of a manager of an infant. "The power of the manager for an infant heir to charge an estate not his own is under the Hindoo law a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where the charge is one that a prudent owner

would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But of course, if that danger arises, or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause."

This is a suit brought by the appellant Konwur Doorganath Roy to set aside certain alienations of two-thirds of an ancestral mehal called Gopejan, made by his grandmother Rani Rashmoni, on the ground that the mehal had been dedicated to the worship of an idol Radha Mohun Thakoor. The respondents are the successors of the original grantees, or persons deriving title from them. To show the position of Rashmoni at the time she made the alienations in question, and that she may have acted not merely as the widow and heiress of her deceased husband Roy Bijoy Krishna, an anumati-patra has been put in, which gave her, undoubtedly, special powers. The anumati-patra, or so much of it as is material, is as follows:—" You are my wife. You have no children born to you. I am now very ill in body. I have no hope of life. On my death there will be no one to perform the ancestral deb kirti (worship of the gods), &c., and offer the jolpinda (funeral cake and libations of water) of my ancestors. For the observance of all these rites, and of the jolpinda to the ancestors, as well as the preservation of the zemindaris, lakiraj, dewuttur, &c., I in my sound mind give you permission on my death to keep possession of my zemindaris, dewuttur, &c., recording your own name in the Collectorate Sherishta, to remain in enjoyment of the profits, and to defray the expenses of the deb kirti during your life-time, and to adopt one or two sons born in the family of true Brahmans. On your death, that adopted son will succeed to all properties; and on the said adopted son attaining his majority, you will, if you should desire it, get his name recorded in the Zemindari Tahoot, and surrender the entire management to him;" and then there is this statement: " Now, I am a debtor to mahajuns (creditors). Some mehals of the zemindari are in mortgage on account of those debts. If there should be no other means of liquidating the debts, you will either sell a small portion of the zemindari or make conditional sale of it, as appears necessary, and liquidate the debts."

Now, undoubtedly, there is a reference to dewuttur property in this document, but this document itself creates no endowment; and it is necessary for the plaintiff to show *aliunde* that there was an existing en-

dowment in favour of this particular idol to which the word dewuttur may be referred.

With regard to the position of Rashmoni under the anumati-patra, it would seem that she took a life-interest in the properties, and that power was given to her by it to adopt a son. It must, of course, be admitted that this document gave no authority to Rashmoni to alienate the estate; but she had, as the manager of the estate, power, if it were dewuttur dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol; and if it were secular, to alienate it if it became necessary to do so to preserve the rest of the family estate.

That being her position, she made the two alienations in question. The first is a mourussi mokurruri pottah, which she granted to two persons, Nimai Soondur Roy and Ram Soondur Sen. This pottah describes the estate thus: Turruf Wargopjan *alias* Gowaljan, which is admitted to be the estate Gopejan, "the patrimonial dewuttur rent-free land of Bijoy Krishna Roy, my late husband, the boundaries of which are on the east the Ganges," and so on, "is the dewuttur property of the Sri Sri Iswar Radhamohun Thakoor of Raninuggur, which is in my possession and enjoyment as shebait of the idol." Then the grantor notices the fact that 120 beegahs, or one-third of that mehal, had been decreed to Bhagiruthi Debi, the widow of one of her husband's brothers, Ram Krishna Roy. "With the exception of 120 beegahs of mathan land decreed in the suit of Bhagiruthi Debi, widow of the late Ram Krishna Roy, the eldest brother of my late husband, the remaining lakheraj lands," and so on. The document proceeds: "Now the temple of the Sri Sri Iswar being broken, and necessary repairs and various other things being requisite for the service of the idol, I have given you a settlement as a mourussi mokurruri talook of the entire lakheraj zemindari rights in the said mouzah, at a fixed premium of Rs. 325, for a consideration of Company's Rs. 1,900, which I have received in cash and in full weight." That is the substance of the document.

The other document is executed by Rashmoni in favour of Soondur Krishna Sen, one of the family of one of the grantees of the mokurruri. It is a bill of sale of the proprietary right to the extent of Rs. 300 of the mokurruri rent, and it says: "Deducting the land of the said decree, the remainder is my own right," referring to the decree in favour of Bhagiruthi, "a mourussi and mokurruri talook, representing the entire

right in the lakheraj zemindari, was given in settlement of Nimai Soondur Roy, inhabitant of Naharpara, and Ram Soondur Sen, inhabitant of Koridha, at an annual jumma of Rs. 325, exclusive of collection charges, on the 18th of Cheyt, of the year 1254. They hold possession of the property as a mourussi and mokurruri talook, and are paying the fixed jumma. I, agreeably to the instructions of my late husband, have commenced building the temples of Sri Sri Iswar Radhamohun Thakoor Jeo and others, but being in want of means, am unable to carry out the instructions of my husband. I have voluntarily, in my sound senses, sold to you, for Company's Rs. 1,700, my own entire share of 14 annas, 15 gundahs, 1 cowri, 2 kags out of 16 annas of the said mourussi mukurruri mouzah, the jumma of which is Rs. 300."

Mr. Leith, on the part of the appellant, undertook to satisfy their Lordships that this mehal of Gopejan had been dedicated to the idol, and therefore it was incompetent for Rashmoni to make these alienations.

Now, apart from the admissions contained in the mourussi pottah and the bill of sale themselves, their Lordships are clearly of opinion, in accordance with the view of the High Court, that the evidence fails to show that this land was so dedicated.

Mr. Leith opened his case by an endeavour to show a deed of foundation or endowment of the idol by the gift of this estate from Rajah Mahanund, who was the father of Rajah Bijoy Krishna, the husband of Rani Rashmoni.

It may be convenient to state here the position of the family so far as it is material to the present case. Rajah Mahanund, who, it is said, was the founder of this endowment, died in 1805 or 1806. He had a son Bijoy, who left a widow, Rashmoni, giving her the anumati-patra, to which reference has already been made. She, it appeared, lived until February 1870. She exercised the power of adoption given to her by her husband, and adopted Krishna Chunder, who married Rani Prosunnomyi Debi. He also had no son; and he also gave to his wife a power of adoption, which she exercised in favor of the appellant, Konwur Doorganath Roy. It appears that Rajah Bijoy had two brothers, and one of them married a lady of the name of Bhaguruthi Debi, who in the year 1855 brought a suit against Rashmoni, and obtained the decree already mentioned, to recover one-third of the mehal of Gopejan.

If the deed of endowment from Rajah Mahanund were satisfactorily proved, and it were an endowment which dedicated this mehal to the

service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favor of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case.

The proof of this deed of endowment, which is said to have been executed by the Rajah Mahanund, when it comes to be investigated, is of the most unsatisfactory description. First, the existence of such a deed at all is not clearly made out; and so far as the document, the rubicari of a former suit, is relied upon as showing its contents, the description there given is so obscure that it is impossible to say whether the whole of the mehal of Gopejan was included in the supposed dedication or not.

First, with respect to the nature of the proof; what is relied upon as evidence of the deed is a rubicari of a proceeding in a former suit brought by a creditor against Rashmoni in the year 1840. It appears that in that suit certain property was attached, and that Rashmoni, in order to get rid of the attachment, set up that the property so attached was dewuttur property dedicated to the idol Radha Mohun Thakoor. It appears from the rubicari that this deed was put forward by a man called Bhuttacharjya, who was the tasildar of Rani Rashmoni. Neither the deed itself nor a copy has been produced in the present suit. No witness has been called who ever saw it; and it is to be observed that though Bhuttacharjya was called as a witness in the suit brought by Prosunnomoyi, on behalf of the present appellant, to set aside these deeds during the life-time of Rashmoni, and which was dismissed, because it was considered to be incompetent to institute it during the lifetime of Rashmoni, he was not asked any question about this deed.

The state of the case, then, is this: No evidence has been given of the existence of such a deed, except the mention of it in the rubicari; no witness has been called who ever saw it. The man who produced it in the creditor's suit, when called in Prosunnomoyi's suit, does not refer to it; and the only search which has been proved is a search made by some clerk in the sherista of the zemindary—a young clerk who was not likely to have any knowledge of the deed, and who simply says that upon search he did not find it there.

In that state of things their Lordships think it is very doubtful

whether secondary evidence of the deed should be permitted at all; but if it be allowed, then they are to judge of the effect of the secondary evidence, and to determine, in the first place, whether it satisfied them that such a deed really existed at all. Now, from the circumstances which have been already pointed out, they are by no means satisfied that such a deed ever did exist. That a document of the kind was put forward by Bhuttacharjya on behalf of Rashmoni in the creditor's suit is proved by the rubicari; but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

But assuming that a deed did exist, and that it was to the effect which is referred to in the rubicari, their Lordships find that the question, what property was included in it, is left in considerable obscurity. It appears that the property which had been attached was a brick-built house and garden. The rubicari states: "It appears from a perusal of the whole of the papers of the record, that for the payment of the money due to the plaintiff, the brick-built house and garden, &c., belonging to the defendant, were under attachment. After issue of notice of auction sale, the objector above-mentioned filed a petition, stating, among other matters, that the properties which were assigned by Raja Mahanund Roy, father-in-law of the defendant, for the worship of the idol Radha Mohun Thakoor, &c., established by the Raja, cannot be sold or transferred by his heirs." It appears that there was an order that the sale should be stayed, and that the objector should file proofs of his statement. The rubicari states: "Accordingly the objector filed the Shevaitnama of the 5th of Aughran 1202, under seal and signature of Raja Mahanund, accompanied by an isumnuvisi containing the names of four witnesses." Then: "The objector has also filed a copy of the nikas paper of the year 1213, bearing the seal and signature of the Collector, to prove that the properties of the deb-sheva, as aforesaid, are part and parcel of the lakheraj mouzah Gowaljan." That appears to be this mouzah Gopejan. This is the only phrase which can be relied upon as showing that the entire mehal was included in the supposed endowment. But the passage is in itself obscure. The literal reading of it is that the brick-built house, garden, &c., which had been devoted to the idol, were part and parcel of the lakheraj mouzah Gowaljan. It is quite consistent with that statement that these parcels had been taken out of that lakheraj mouzah and devoted to the idol.

Therefore, in addition to the insufficiency of the proof to satisfy their Lordships with reasonable certainty that such a document really

existed, there is so much obscurity in the language that it is impossible to say that if it did exist it inclu ded the whole of this mehal.

If that document is out of the case, there is very slight evidence indeed of any such endowment. The case then rests, independently of the admissions in the deeds, upon the evidence of the dewan and mooktear and one or two other witnesses, that the rents of this mehal Gopejan were applied to the worship of this idol. But that evidence is extremely vague and extremely loose. The mokhtear says in several places that the rents were applied to the worship of the idols, and it is plain from all the evidence in the case that there were several idols belonging to this family, and no doubt the rents of some of the family mehals were applied to sustain their temples and worship. But supposing it to be taken that the rents of this mehal were applied during the period that the witnesses speak of, to the worship of the idol Radha Mohun, that fact is by no means sufficient to establish the onus which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. Very strong and clear evidence of such an endowment ought to exist. In the present case there is no proof that priests were appointed. If any had been appointed, they might have been called. There is no production of accounts showing that the rents were separately collected and applied for the worship of this idol. For anything that appears, the rents may have gone into the general body of the accounts relating to the estates of this family, and there is really no document whatever upon which the finger can be placed to show that an endowment was made, other than that rubicari to which reference has already been made.

Besides the weakness of the proof of endowment on the part of the plaintiff, strong presumptions that there was none arise from other facts and circumstances in the case. It is said that the application of the rents of this particular mehal for a certain period to this idol is some evidence that the family were aware that the rents were properly and by rights so to be devoted; but if the conduct of the family is to be regarded, there is, on the other side, the strongest indication from what occurred in the suit brought by Bhagiruthi, the widow of the eldest brother of Bijoy, that the family understood that there was no such endowment. That suit was brought by Bhagiruthi to recover from Rashmoni one-third of the mehal in question. She did not claim it as property to which she was entitled as joint shebait, but she claimed it as one-third of the family estate to which she, as widow of one of the

brothers, was entitled. That is her claim. Rashmoni does not set up as a defence that the mehal was dewuttur property devoted to this idol, that she was the shebait, and entitled, at all events, to the possession and the management of it—she sets up no case of that sort—but allows a decree to be passed against her in favour of Bhagiruthi to recover one-third of the mehal, and in that decree the property is described, not as dewuttur, but as bromuttur property.

Now, if this mehal had been really dedicated to the idol, it would no longer have been a partible estate. Rashmoni would, as shebait, have been entitled to the possession of it, and to the management and disposition of the revenues; and all that Bhagiruthi could have been entitled to would have been a share in the surplus revenues, if there should have been a surplus, after due provision had been made for the worship of the idol.

Therefore there is not only weakness of proof on the part of the plaintiff, but a very strong presumption, arising from the conduct of the parties in the suit in question, that this was not dewuttur property such as it is alleged to be on the part of the plaintiff.

Supposing the case had rested there, their Lordships feel no doubt whatever that the judgment of the High Court was perfectly right. But it does not rest there, and it now becomes material to consider the terms of the mourussi pottah and of the bill of sale. Mr. Leith, in his reply, very properly relied on them as being the strength of his case. If they are to be used as evidence only, then this evidence must be weighed with all the other evidence in the case, and so weighing it, their Lordships are not satisfied that it turns the scale in favour of this property being dewuttur. But the statements in these deeds are relied upon by the plaintiff as an admission which estops the parties to them from asserting that these lands were not dewuttur. But if the statements are relied on in this way, they must be taken as a whole; and so taking them, it would appear that, granting the lands were dewuttur, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol. The mokurruri was granted according to the statement, because the temple was out of repair, and money was wanted to restore it. The sale of part of the mokurruri rent was granted in consideration of money stated to be required for the completion of the temple, which it was stated was already in course of erection. If, therefore, the statements in these deeds are

taken as a whole, the alienations they contain were justifiable, assuming the property to have been dewuttur land.

What, then, is the plaintiff's position? These deeds are 30 years old, and he comes into Court to set them aside upon the ground that they were collusive; and if he could have shown that the representation, although made, was not believed by the grantees, and that they colluded with Rashmoni to put a pretended consideration on the face of the deeds, he might have succeeded. But there is no evidence whatever of any such collusion. There is nothing to show that the original grantees did not believe the statements appearing upon the face of the deeds; indeed, if they had made inquiry they would have found that the fact agreed with the statement, for it appears upon the evidence and upon the finding of the subordinate Judge that the temples were out of repair. If, then, the temples were out of repair, and if Rashmoni offered this mokurruri pottah to raise money for the purpose of doing the repairs that the temple required, the purchaser, who *boná-fide* took it upon that representation, would clearly be entitled to keep his purchase. It may be that Rashmoni did not intend to apply the money to the purpose for which she professed to require it. It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did. But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colourable one, he could not be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose. She, as the manager of this estate, had the same right, or an analogous right to that of the manager of an infant heir; and that was defined in very plain language in the case in 6th Moore, page 423: "The power of the manager for an infant heir to charge an estate not his own is under the Hindoo law a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *boná-fide* lender is not affected by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a ne-

cessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *malâ-fide*, will not be affected though it be shown that with better management the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as much as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge; and they do not think that under such circumstances he is bound to see to the application of the money." That passage was adopted in a very late case before this Board, Prosunno Kumari Debya *v.* Golab Chand Baboo, in the 2nd Law Reports, Indian Appeals, page 151. In that case a shebait had incurred debts and mortgaged the property of the idol for the purpose of the necessary sustentation of the worship of the idol; and this tribunal held that the position of the shebait was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate. Here it cannot be said the grant of a mokurruri pottah was an improvident way of raising money if it were necessary to do it at all. It still left a rent for the sustentation of the idol; and if the transaction be *bonâ-fide,* the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced.

On these grounds, therefore, their Lordships think that, assuming the purchasers to be bound by the representations in the deeds, there being no evidence that they did not put entire faith in them, the grants cannot now be impeached.

It was objected on the part of the plaintiff that this answer had not been put forward by the defendants, and undoubtedly they have relied more strongly upon the defence that the land was not dewuttur land at all. But several paragraphs in the written statements were pointed out, in which the case was made. It is no doubt alleged in these paragraphs that the money was wanted for two purposes, for the sustentation of the worship of the idol and the repairs of the temple, and also for the payment of Government revenue. But their Lordships think that there is enough in those statements to allow of the present answer to the estoppel being made on the part of the respondents, and it is to

be observed that in the suit brought by Prosonnomoyi during the lifetime of Rashmoni, in which the original grantee, Sen, was a party, he there set up the defence in a perfectly correct form, namely, that the representation made was that the money was wanted for the repairs of the temple, and that he advanced it for that purpose.

But assuming the facts to be as alleged in the statement of defence, their Lordships are still of opinion that the plaintiff could not succeed on this plaint in setting aside the deeds; because if part of the money only was required for the repairs of the idol, or was represented to have been so required, and this was *bonâ-fide* believed in by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose. It would then come to this, that too much of the idol's property may have been granted, and that a less quantity of land than that included in the grants would have sufficed to raise the money required for the temples; but that would not be a sufficient ground for setting aside the deeds altogether. The plaintiff in that case should have offered to reimburse the *bonâ-fide* purchasers so much of the money as had been legitimately advanced.

Their Lordships, in making these last observations, do not wish it to be understood that this is the case which appears upon the facts; they make these observations with reference only to the pleadings, and to indicate that, supposing that technical objection could have been made to the pleadings, it still would not have availed the appellant in the present appeal, because even so his suit in the present form could not have been sustained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

A ELEMENTARY COURSE OF LAW LECTURES.

Lecture III.

On Will or Testament.

In Hindoo law there is no such thing as a true Will. The place filled by Wills isoccupied by Adoptions. We can now see the relation of the Testamentary Power to the Faculty of Adoption, and the reason why the exercise of either of them could call up a peculiar solicitude for the performance of the *sacra*. Both a Will and an Adoption threaten

a distortion of the ordinary course of Family descent, but they are obviously contrivances for preventing the descent being wholly interrupted, when there is no succession of kindred to carry it on. Of the two expedients Adoption, the factitious creation of blood-relationship, is the only one which has suggested itself to the greater part of archaic societies. The Hindoos have indeed advanced one point on what was doubtless the antique practice, by allowing the widow to adopt when the father has neglected to do so, and there are in the local customs of Bengal some faint traces of the Testamentary powers. But to the Romans* belongs pre-eminently the credit of inventing the Will, the institution which, next to the Contract, has exercised the greatest influence in transforming human society. We must be careful not to attribute to it in its earliest shape the functions which have attended it in more recent times. It was at first, not a mode of distributing a dead man's goods, but one among several ways of transferring the representation of the household to a new chief. The goods descend no doubt to the Heir, but that is only because the government of the family carries with it in its devolution the power of disposing of the common stock. It will be found that Wills were never looked upon in the Roman community as a contrivance for parting Property and the Family, or for creating a variety of miscellaneous interests, but rather as a means of making a better provision for the members of a household than could be secured through the rules of Intestate Succession.

It seems that Testaments were at first only allowed to take effect on failure of the persons entitled to have the inheritance by right of blood genuine or fictitious. Thus, when Athenian citizens were empowered for the first time by the Laws of Solon to execute Testaments, they were forbidden to disinherit their direct male descendants. So too, the Will of Bengal is only permitted to govern the succession so far as it is consistent with certain over-riding claims of the family.

We have it stated on abundant authority that Testaments, during the primitive period of the Roman State, were executed in the Comitia Calata, that is, in the Comitia Curiata, or Parliament of the Patrician Burghers of Rome, when assembled for Private Business. This mode

* The only form of testament, not belonging to a Roman or Hellenic society, which can with any reason be supposed indigenous, is that recognised by the usages of the province of Bengal; and the testament of Bengal, which some have even supposed to be an invention of Anglo-Indian lawyers, is at most only a rudimentary Will.

of execution has been the source of the assertion, handed down by one generation of civilians to another, that every Will at one era of Roman history was a solemn legislative enactment. But there is no necessity whatever for resorting to an explanation which has the defect of attributing far too much precision to the proceedings of the ancient assembly. The proper key to the story concerning the execution of Wills in the Comitia Calata must no doubt be sought in the oldest Roman law of *intestate* succession. The canons of primitive Roman jurisprudence regulating the inheritance of relations from each other were, so long as they remained unmodified by the Edictal Law of the Prœtor, to the following effect:—First, the *sui* or direct descendants who had never been emancipated succeeded. On the failure of the *sui*, the Nearest Agnate came into their place, that is the nearest person or class of the kindred who was or might have been under the same Patria Potestas with the deceased. The third and last degree came next, in which the inheritance devolved on the *gentiles*, that is, on the collective members of the dead man's *gens* or House.* Now the Patrician Assembly called the Comitia Curiata was a Legislature in which Gentes or Houses were exclusively represented. It was a representative assembly of the Roman people, constituted on the assumption that the constituent unit of the state was the Gens. This being so, the inference seems inevitable, that the cognisance of Wills by the Comitia was connected with the rights of the Gentiles, and was intended to secure them in their privilege of ultimate inheritance. The whole apparent anomaly is removed, if we suppose that a Testament could only be made when the Testator had no *gentiles* discoverable, or when they waived their claims, and that every Testament was submitted to the General Assembly of the Roman Gentes, in order that those aggrieved by its dispositions might put their veto upon it if they pleased, or by allowing it to pass might be presumed to have renounced their reversion.

The Testament to which the pedigree of all modern Wills may be traced is not, however, the Testament executed in the Calata Comitia, but another Testament designed to compete with it and destined to supersede it. The historical importance of this early Roman Will, and the light it casts on much of ancient thought, will excuse me for describing it at some length.

* The House was a fictitious extension of the family, consisting of all Roman. Patrician citizens who bore the same name and who, on the ground of bearing the same name, were upposed to be descended from a common ancestor.

When the Testamentary power first discloses itself to us in legal history, there are signs that, like almost all the great Roman institutions, it was the subject of contention between the Patricians and the Plebians. The effect of the political maxim, *Plebs Gentem non habet*, "a Plebian cannot be a member of a house," was entirely to exclude the Plebians from the Comitia Curiata. Some critics have accordingly supposed that a Plebian could not have his Will read or recited to the Patrician Assembly, and was thus deprived of Testamentary privileges altogether. Others have been satisfied to point out the hardships of having to submit a proposed Will to the unfriendly jurisdiction of an assembly in which the Testator was not represented. Whatever be the true view, a form of Testament came into use, which has all the characteristics of a contrivance intended to evade some distasteful obligation. The Will in question was a conveyance *inter vivos*, a complete and irrevocable alienation of the Testator's family and substance to the person whom he meant to be his heir. The strict rules of Roman law must always have permitted such an alienation, but when the transaction was intended to have a posthumous effect, there may have been disputes whether it was valid for Testamentary purposes without the formal assent of the Patrician Parliament.

The Plebian Will acquired at Rome all the popularity which the Testament submitted to the Calata Comitia appears to have lost. The key to all its characteristics lies in its descent from the *Mancipium*, or ancient Roman conveyance, a proceeding to which we may unhesitatingly assign the parentage of two great institutions without which modern society can scarcely be supposed capable of holding together, the Contract and the Will. The Mancipium, or, as the word would exhibit itself in later Latinity, the Mancipation, carries us back by its incidents to the infancy of civil society. As it sprang from times long anterior, if not to the invention, at all events to the popularisation, of the art of writing, gestures, symbolical acts, and solemn phrases take the place of documentary forms, and a lengthy and intricate ceremonial is intended to call the attention of the parties to the importance of the transaction, and to impress it on the memory of the witnesses. The imperfection, too, of oral, as compared with written, testimony necessitates the multiplication of the witnesses and assistants beyond what in later times would be reasonable or intelligible limits.

The Roman Mancipation required the presence first of all of the parties, the vendor and vendee or more technically grantor and grantee.

There were also no less than *five* witnesses; and an anomalous personage, the Libripens, who brought with him a pair of scales to weigh the uncoined copper money of ancient Rome. The Testament we are considering—the Testament *per æs et libram,* "with the copper and the scales," as it long continued to be technically called—was an ordinary Mancipation with no charge in the form and hardly any in words. The Testator was the grantor; the five witnesses and the libripens were present; and the place of grantee was taken by a person known technically as the *familiæ emptor,* the Purchaser of the Family. The ordinary ceremony of a Mancipation was then proceeded with. Certain formal gestures were made and sentences pronounced. The *Emptor familiæ* simulated the payment of a price by striking the scales with a piece of money, and finally the Testator ratified what had been done in a set form of words called the "Nuncupatio" or publication of the transaction, a phrase which has had a long history in Testamentary jurisprudence. It is necessary to attend particularly to the character of the person called *familiæ emptor.* There is no doubt that at first he was the Heir himself. The Testator conveyed to him outright his whole "familia," *i. e.,* all the rights he enjoyed over and through the family; his property, his slaves, and all his ancestral privileges, together, on the other hand, with all his duties and obligations.

With these data before us, we are able to note several remarkable points in which the Mancipatory Testament, as it may be called, differed in its primitive form from a modern Will. As it amounted to a conveyance *out and out* of the Testator's estate, it was not *revocable.* There could be no new exercise of a power which had been exhausted.

Again, it was not secret. The *Familiæ Emptor,* being himself the Heir, knew exactly what his rights were, and was aware that he was irreversibly entitled to the inheritance. But perhaps the most surprising consequences of this relation of Testaments to conveyances was the immediate vesting of the Inheritance in the Heir. This has seemed so incredible to not a few civilians, that they have spoken of the Testator's estate as vesting conditionally on the Testator's death, or as granted to him from a time uncertain, *i. e.,* the death of the grantor. But down to the latest period of Roman jurisprudence there was a certain class of transactions which never admitted of being directly modified by a condition, or of being limited to or from a point of time. In technical language they did not admit *conditio* or *dies.* Mancipation was one of them, and therefore, strange as it may seem, we are forced to conclude

that the primitive Roman Will took effect at once, even though the Testator survived his act of Testation. It is indeed likely that Roman citizens originally made their Wills only in the article of death, and that a provision for the continuance of the family effected by a man in the flower of life would take the form rather of an Adoption than of a Will. Still we must believe that, if the Testator did recover, he could only continue to govern his household by the sufferance of his Heir.

Originally the essential character of the formalities had required that the Heir himself should be the Purchaser of the Family, and the consequence was that he not only instantly acquired a vested interest in the Testator's Property but was formally made aware of his rights. But the age of Gaius permitted some unconcerned person to officiate as Purchaser of the Family. The Heir, therefore, was not necessarily informed of the succession to which he was destined; and Wills thenceforward acquired the property of *secrecy*. The substitution of a stranger for the actual Heir in the functions of " Familiæ Emptor" had other ulterior consequences. As soon as it was legalised, a Roman Testament came to consist of two parts or stages,—a Conveyance, which was a pure form, and a Nuncupatio, or Publication. In this latter passage of the proceeding, the Testator either orally declared to the assistants the wishes which were to be executed after his death, or produced a written document in which his wishes were embodied. It was not probably till attention had been quite drawn off from the imaginary Conveyance, and concentrated on the Nuncupation as the essential part of the transaction, that Wills were allowed to become *revocable*.

BOMBAY HIGH COURT.

The 18*th July*, 1876.

PRESENT:

Mr. Justice Kemball, Mr. Justice Nanabhai Haridas and Mr. Justice Melvill.

REG. *vs.* GOVINDA.*

***Murder—Culpable homicide—Indian Penal Code (Act XLV. of* 1860*), Sections* 299 *and* 300.**

Where the prisoner knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain, and she died in consequence, either on the spot, or very shortly afterwards,

* *Vide* I. L. R., 1, Bom. Series, p. 342.

Held, that there being no intention to cause death, and the bodily injury not being sufficient in the ordinary course of nature to cause death, the offence committed by the prisoner was not murder, but culpable homicide not amounting to murder.

Their Lordships at the outset intimated to the Government Pleader that there was a difference of opinion between them as to what offence the prisoner had committed, and that the case should accordingly be referred to Melvill, J., for his opinion.

In reviewing the case, Mr. Justice Kemball minuted thus :—

"That the prisoner was exceedingly cruel to his wife, and that he was legally guilty of her murder, I have no doubt; but having regard to the circumstances, the age of the prisoner, and the manifest state of doubt of the Judge as to what would be the appropriate sentence, make me hesitate to confirm the sentence of death, and I am disposed to alter it to transportation for life."

Mr. Justice Nanabhai Haridas' minute ran thus :—

"I am not satisfied that the prisoner intended to murder his wife. There is hardly evidence sufficient to prove the 'intention' or 'knowledge' requisite under section 300, Indian Penal Code.

"That the prisoner acted cruelly, is quite clear. Still there is no evidence that he beat her otherwise than with his fist on the face, the blow or blows on the nose causing effusion of blood on the brain which proved fatal. The kicks on the back and the blows on the chest were not the cause of death according to the doctor's evidence. It is quite possible—by no means improbable—that he may have, as he says, only intended to chastise her, though rather severely. I am disposed to think his act was culpable homicide not amounting to murder, and that it is punishable under Section 304, Indian Penal Code.

"No apparent motive is shown for taking her life.

"People often survive such blows, and the prisoner may have only intended to cause hurt, though aware that hurt might prove dangerous."

MELVILL, J. :—I understand that these proceedings have been referred to me under Section 271-B of the Code of Criminal Procedure, in order that I may decide whether the offence committed by the prisoner was murder, or culpable homicide not amounting to murder.

For convenience of comparison, the provisions of Sections 299 and 300 of the Indian Penal Code may be stated thus :—

Section 299.	Section 300.
A person commits culpable ho-	Subject to certain exceptions, cul-

micide, if the act by which the death is caused is done	pable homicide is murder, if the act by which the death is caused is done
(*a*) With the intention of causing death;	(1) With the intention of causing death;
(*b*) With the intention of causing such bodily injury as is *likely* to cause death;	(2) With the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of *the person to whom the harm is caused;* (3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature* to cause death;
(*c*) With the knowledge that * * * the act is *likely* to cause death.	(4) With the knowledge that the act is *so imminently dangerous that it must in all probability cause death,* or such bodily injury as is likely to cause death.

I have underlined the words which appear to me to mark the differences between the two offences.

(*a*) and (1) show that where there is an intention to kill, the offence is always murder.

(*c*) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.

The essence of (2) appears to me to be found in the words which I have underlined. The offence is murder, if the offender *knows* that the *particular person injured* is likely, either from peculiarity of constitution, or immature age, or other special circumstance, to be killed by an injury which would not ordinarily cause death. The illustration given in the section is the following :—

"A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health."

There remain to be considered (*b*) and (3), and it is on a comparison of these two clauses that the decision of doubtful cases like the present must generally depend. The offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death; it is murder, if such injury is *sufficient in the ordinary course of nature* to cause death. The distinction is fine, but appreciable. It is much the same distinction as that between (*c*) and (4), already noticed. It is a question of degree of probability. Practically, I think, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death.

In the present case the prisoner, a young man of 18, appears to have kicked his wife (a girl of 15) and to have struck her several times with his fist on the back. These blows seem to have caused her no serious injury. She, however, fell on the ground, and I think that the evidence shows that the prisoner then put one knee on her chest, and struck her two or three times on the face. One or two of these blows, which, from the medical evidence, I believe to have been violent and to have been delivered with the closed fist, took effect on the girl's left eye, producing contusion and discoloration. The skull was not fractured, but the blow caused an extravasation of blood on the brain, and the girl died in consequence either on the spot, or very shortly afterwards. On this state of facts the Sessions Judge and the assessors have found the prisoner guilty of murder, and he has been sentenced to death. I am myself of opinion that the offence is culpable homicide, and not murder. I do not think there was an intention to cause death; nor do I think that the bodily injury was sufficient in the ordinary course of nature to cause death. Ordinarily, I think, it would not cause death. But a violent blow in the eye from a man's fist, while the person struck is lying with his or her head on the ground, is certainly likely to cause death, either by producing concussion or extravasation of blood on the surface or in the substance of the brain. A reference to Taylor's Medical Jurisprudence (Fourth Edition, page 294) will show how easily life may be destroyed by a blow on the head producing extravasation of blood.

For these reasons I am of opinion that the prisoner should be convicted of culpable homicide not amounting to murder, and I would sentence him to transportation for seven years.

This order was accordingly passed by the Court.

MADRAS HIGH COURT.

The 16th October, 1876.

PRESENT:

Mr. Justice Holloway and Mr. Justice Innes.

PROCEEDINGS,* 16TH OCTOBER, 1876.

Evidence—Confession of co-prisoner—Act I. of 1872, *Section* 30.

A conviction based solely on the evidence of a co-prisoner is bad in law.

Upon a reference, by the Magistrate of Bellary, of the Proceedings of the 2nd-class Magistrate of Kumply in Cases Nos. 158 and 159 of 1876, as contrary to law, the High Court passed the following

RULING.—In these cases two prisoners have been convicted of theft and have each been sentenced to be rigorously imprisoned for four months in the first case and for two months in the second.

The only evidence against the second prisoner was a confession made by the first prisoner. Evidence was also given of a statement made by the second prisoner to a police constable: this statement, however, should not have been admitted in evidence.

The High Court has already ruled (High Court Proceedings, 24th January 1873) that a conviction based solely upon the evidence of a co-prisoner is bad in law.

The conviction of the second prisoner is accordingly annulled. The Magistrate will forthwith discharge the second prisoner from custody.

BOMBAY HIGH COURT.

The 17th August, 1876.

PRESENT:

Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

REG. *vs*. PARSAPA† MAHADEVAPA.

Contempt of Court.

The accused was tried and convicted by the Second Class Magistrate of Haliyál for continuance of nuisance after injunction to discontinue it under Section 291 of the Indian Penal Code. The injunction having been issued by the Magistrate himself, Mr. Macdonald doubted the legality of the trial before that Magistrate; and hence referred the case for the orders of the High Court.

* *Vide* I. L. R., 1, Madras Series, p. 163.

† *Vide*, I. L. R., 1, Bom. Series, p. 339.

The case was heard by MELVILL and NANABHAI HARIDAS, JJ.

Neither the accused nor the Crown was represented.

PER CURIAM :—The Court does not think that it can follow the Allahabad High Court* in holding that Section 473 of the Criminal Procedure Code, when it says that no Court shall try any person for an offence committed in contempt of its own authority, is to be limited to offences falling under Chap. X. of the Indian Penal Code. The reasons given by the Madras High Court for extending the section, at all events, to the offences against public justice and the offences relating to documents mentioned in Sections 468 and 469 of the Criminal Procedure Code are, in the Court's mind, conclusive; and a Division Bench of this Court seems to have been of opinion that the section must be held applicable to all contempts of Court. If the limitation imposed upon the section by the Allahabad Court be removed, as the Court thinks it must, the section must necessarily be held applicable to the case now before it; for the continuance of a nuisance, after the Magistrate's injunction to desist, is clearly a contempt of the Magistrate's authority.

The Court considers it must, therefore, annul the conviction and sentence.

CALCUTTA HIGH COURT.

The 11th September, 1876.

PRESENT :

Mr. Justice Markby and Mr. Justice Mitter.

IN THE MATTER OF JUGGUT CHUNDER CHUCKERBUTTY.†

Criminal Procedure Code (Act X. of 1872*), ss.* 294 *and* 297*—Revision —Power of High Court—" Material Error."*

In a case of apprehended breach of peace, the Magistrate bound over the parties in sums of money aggregating on the whole to Rs. 60,000 or upwards. The High Court quashed the order, holding that it was altogether unreasonable.

MARKBY, J. (In delivering judgment said) :—The Sessions Judge is quite right in supposing that this Court would not ordinarily interfere with the discretion of Magistrates, as to the amount of security to be taken in cases of this kind. The Magistrate is in a much better position than this Court for judging what would be the proper amount of security, which must vary with the danger to be apprehended and the

* *Vide* I. L. R, 1, All. Series, p. 129.

† *Vide* I. L. R., 2, Calcutta Series, p. 110.

means of the parties. But the Magistrate cannot make an order that is altogether unreasonable. Here the Magistrate, although there has been as yet no breach of the peace, and apparently no very strong determination to the resort to violence, has required the parties to enter into bonds amounting altogether to upwards of Rs. 60,000. The parties do not appear to be wealthy ; and had the security ordered been really required, in all probability it could not have been furnished. We find, however, that one of the parties, who has been accepted as surety for Rs. 5,000, is described as a *kotwal* and another as a *mookhtear*, and all the bonds were executed on the very day the order was made. It would thus appear as if the amounts mentioned in the bond are merely nominal, and that no real security to that extent was required.

I consider that in this case, the Joint Magistrate has not done that which the law requires. Either he has wholly failed to exercise the discretion which the law requires him to exercise in taking security for good behaviour, or, if he has exercised it at all, he has exercised it in a manner which is altogether unreasonable. Whichever be the case, I do not think we ought to allow such an order to stand.

BOMBAY HIGH COURT.

The 7th September, 1876.

PRESENT:

Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

REG. *vs.* SAMBHU RAGHU.*

The Indian Penal Code (Act XLV. of 1860, *Section* 494*)—Bigamy—Authority of caste to declare a marriage void.*

Courts of law will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to re-marry.

Bonâ fide belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge, under Section 494 of the Indian Penal Code, of marrying again during the life-time of the first husband, or to a charge of abetment of that offence under that section combined with Section 109.

PER CURIAM :—The Acting Session Judge has considered this case very carefully, and the Court agrees in his conclusion. The Court does not find it established that there is any valid custom by which a woman of the caste of the first accused can claim a right to marry again, be-

* *Vide* I. L. R., 1, Bom. Series, p. 347.

cause her husband is a leper, and without having obtained a release from him. The Court does not recognize the authority of the caste to declare a marriage void, or to give permission to a woman to re-marry. The wife in this case, and the appellant, who performed the ceremony of re-marriage, probably acted in a *bonâ-fide* belief that the consent of the caste made the second marriage valid; but though that circumstance may be taken into account in mitigation of punishment, it does not constitute a defence to a charge under Section 494 of the Indian Penal Code, or under that section combined with section 109 of the Code. The Court confirms the conviction; but, as the appellant has already undergone imprisonment for 25 days, it remits the remainder of his sentence.

LEASES,—STAMP AND REGISTRATION.

From 1st May 1814 to January 1825.

				Amount of Duty.		
				Rs.	As.	P.
Under Beng. Regulation I. of 1814. s. 11.	If the instrument be for a sum not exceeding 16 rupees, or if the value of the property affected by it shall not exceed Rs.		16	0	1	0
	If above Rs. 16 and not exceeding Rs.		64	0	2	0
	Do. 64	Do.	125	0	4	0
	Do. 125	Do.	250	0	8	0
	Do. 250	Do.	500	1	0	0
	Do. 500	Do.	1,000	2	0	0
	Do. 1.000	Do.	2,000	4	0	0
	Do. 2,000	Do.	5,000	8	0	0
	Do. 5,000	Do.	10,000	16	0	0
	Do. 10,000	Do.	20,000	32	0	0
	Do. 20,000	Do.	50,000	50	0	0
	Do. 50,000	Do.	1,00,000	100	0	0
	If above one lac of rupees			150	0	0
	Every lease and its counterpart is required to be written on paper bearing the prescribed stamp, supposing that such lease or other instrument relate to lands held exempt from the payment of revenue to Government; but instruments relating to lands subject to the payment of revenue to Government, need not be written on stampt paper.					

From January 1825 to 16th June 1829.

Under Beng. Reg. XVI. of 1824.

Any lease made in perpetuity, or for a term of years or period determinable with one or more lives, or otherwise contingent in consideration of a sum of money paid in the way of premium, fine, or the like, if without rent.	The same duty as for a conveyance, or sale for a sum of the amount of such consideration. (*Vide* 5, Legal Companion, 17.)

Any lease of lands, houses, or other real property, at a yearly rent without any payment of any sum of money, by way of fine or premium.

			Rs.	As.	P.
Where the yearly rent shall exceed 12 rupees, but shall not exceed 21 rupees			0	8	0
Exceeding 24 rupees, but not exceeding 50 rupees			0	12	0
,, 50	,,	100	1	0	0
,, 100	,,	250	2	0	0
,, 250	,,	500	4	0	0
,, 500	,,	1,000	8	0	0
,, 1,000	,,	2,000	12	0	0
,, 2,000	,,	4,000	16	0	0
,, 4,000	,,	6,000	20	0	0
,, 6,000	,,	10,000	32	0	0
,, 10,000	,,	50,000	64	0	0
Above 50,000			80	9	0

Any lease of lands, houses, or other real property, stipulating for a yearly rent, and granted in consideration of a fine or premium,	Shall be charged with both *ad valorem* duties above provided.
The counterpart of any lease charged with a duty exceeding 8 rupees, shall likewise be executed on paper, vellum, or parchment bearing a stamp of ...	4 0 0

EXEMPTIONS.

All leases or pottahs, when the annual rent shall not exceed 12 Rs.

All leases or pottahs given by the authority of Government or of the Board of Revenue, or other authority exercising the powers of that Board, and of the Court of Wards; pottahs, cobooleuts, and other instruments of contract relating to the rent of land executed between any zemindar, talookdar, farmer, or other sudder malguzar, or any holder or proprietor of land exempt from the payment of revenue, or any mofussil talookdar, ijardar, kutkenadar, or other lease-holder, or the gomastha, factor, or other agent of such zemindar or other person aforesaid on the one part, and a ryot or other actual cultivator on the other, for the land tilled by him.

NOTE.—All leases, pottahs, cobooleuts, or other similar instruments of contract between zemindars, talookdars, or other holders or proprietors of land, whether subject to the payment of revenue to Government or otherwise, farmers, kutkenadars, ijardars, or other tenants, and any other talookdar, kutkenadar, ijardar, or other lease-holder, intermediate between the ryots or actual cultivators, and the sudder malguzar, or lakherajdar, shall be written on stampt paper of the value above prescribed.

From 16th June 1829 to 30th September 1860.

Under Beng. Reg. X. of 1829.

Any lease made in perpetuity, or for a term of years or period determinable with one or more lives, or otherwise contingent, in consideration of a sum of money paid in the way of premium, fine, or the like, if without rent.	The same duty as for a conveyance or sale for a sum of the amount of such consideration. *Vide* 5, Legal Companion, p. 17.

Any lease of lands, houses, or other real property at a monthly or yearly rent, without any payment of any sum of money by way of fine or premium.

	For a period not exceeding one year. Sa. Rs.	A.	For a period exceeding one year. Sa. Rs.	A.
Where the rent calculated for a whole year shall exceed 12 rupees, but not 24 Rs.	0	4	0	8
Exceeding 24 Rs. but not exceeding Rs. 50,	0	8	0	12
50 " 100	0	12	1	0
100 " 250	1	0	2	0
250 " 500	2	0	4	0
500 " 1,000	4	0	8	0
1,000 " 2,000	8	0	12	0
2,000 " 4,000	12	0	16	0
4,000 " 6,000	16	0	20	0
6,000 " 10,000	20	0	32	0
10,000 " 50,000	32	0	64	0
Above 50,000 "	64	0	80	0

Any lease of lands, houses, or other real property stipulating for a yearly rent, and granted in consideration of a fine or premium.	Shall be charged with a duty equal to both *ad valorem* duties above provided, viz., both as lease and conveyance.
The counterpart of any lease, *i. e.*, the kubooleut, or the like.	Shall be executed on paper, vellum, or parchment, bearing the same stamp as the original.

EXEMPTIONS.

All leases, where the annual rent shall not exceed 12 rupees.

All leases, or pottahs given by authority of Government, or of the Board of Revenue, with their counterparts, and all security bonds, executed as part of the same transactions; also all leases, viz., pottahs

and kubooleuts, executed and exchanged with ryots, and other actual cultivators of the soil.

Note.—Leases, pottahs, kubooleuts, or other instruments of contract between zemindars, talookdars, or other holders or proprietors of land, whether subject to the payment of revenue to Government or otherwise, or between farmers, kutkenadars, ijaradars, or other tenants, on one hand, and any other talookdar, kutkenadar, ijaradar, or other lease-holder, intermediate between the ryots or actual cultivators and the sudder malgoozar or lakherajdar, on the other.	Shall be written on stamp paper of the value above prescribed for leases.

From 1st October 1860 to 31st December 1869.

Under Act XXXVI. of 1860 as well as under Act X. of 1862.

Any lease made in perpetuity, or for a term of years, or period determinable within one or more lives, or otherwise contingent, in consideration of a sum of money paid in the way of premium, fine, or the like, if without rent.	The same Stamp as for a Conveyance or Deed of Sale for a sum of the amount of such consideration. (*Vide* 5, Legal Companion, p. 17)

Any lease of lands, houses, or other real property at a rent, without any payment of any sum of money by way of fine or premium—

	When the lease is for a period not exceeding one year.		When the lease is for a period exceeding one year.	
	Rs.	As.	Rs	As.
Where the rent calculated for a whole year shall not exceed Rs. 24 ...	0	4	0	8
Exceeding Rs. 24 but not exceeding Rs 50	0	8	0	12
50 „ 100	0	12	1	0
100 „ 250	1	0	2	0
250 „ 500	2	0	4	0
500 „ 1,000	4	0	8	0
1.000 „ 2,000	8	0	16	0
2,000 „ 4,000	16	0	32	0
4,000 „ 6,000	24	0	48	0
6,000 „ 10,000	40	0	80	0
10,000 „ 25,000	100	0	200	0
25,000 „ 50,000	200	0	400	0
And for every additional 25,000 or part thereof	100	0	200	0

Any lease of lands, houses, or other real property at a rent for an indefinite term, and without any payment of any sum of money by way of fine or premium.	The same Stamp as for a lease for a period exceeding one year.

Under Act XXXVI. of 1860, as well as under Act X. of 1862.

Any lease of lands, houses, or other real property, stipulating for a rent, and granted in consideration of a fine or premium.	A Stamp of value equal to the joint values of the Stamps for a Conveyance in consideration of the fine, and a lease for the rent.
The counterpart of any lease, or a kubooleut or the like.	The same Stamp as for the lease.

EXEMPTIONS.

All Leases, Pottahs, and Kubooleuts executed and exchanged with ryots, and other actual cultivators of the soil, provided that no fine or premium be paid [and no Security Bonds executed as part of the same transactions.]*

(FOR MADRAS AND BOMBAY.)

Every Lease and its counterpart (Pottah and Kubooleut) or other engagement contracted between landlord and tenant, relative to lands subject to the payment of Revenue to Government.

From January, 1870.

Under Act XVIII. of 1869.

(*a*) Where the lease is expressed to be for a term of less than one year.	The Stamp duty with which a Bond† for the total amount payable under such lease is chargeable.
(*b*) Where the lease is expressed to be for a term of not less than one year but not more than three years.	The Stamp duty with which a Bond for the total amount payable under such lease during the first year of the term is chargeable.
(*c*) Where the lease is expressed to be for a term exceeding three years, or where no term is expressed.	The Stamp duty with which a conveyance for the total amount payable under such lease during the first year of the term is chargeable.
(*d*) Where the lease is granted in consideration of a fine or premium and where no rent is reserved.	The Stamp duty with which a conveyance for the amount so paid is chargeable.
(*e*) Where the lease is granted in consideration of a fine or premium and also of a rent.	The Stamp duty with which a conveyance for the amount of the fine or premium is chargeable, in addition to the stamp-duty with which the lease would be chargeable in case no such fine or premium had been paid.
Surrender of Lease.	
(*a*) Where the amount of Stamp duty chargeable on the lease does not exceed Rs. 16.	The Stamp duty with which the lease is chargeable.
(*b*) In any other case. ...	Sixteen Rupees.
Counterpart of a lease or kabooleut.	One Rupee.

* This portion is omitted in Act X. of 1862.

† *Vide the following page.*

† *Vide the following page.*

Bond.

	Rs.	As.	P.
When the amount secured does not exceed Rs. 25, ...	0	2	0
When such amount exceeds Rs. 25, but does not exceed Rs. 50, ...	0	4	0
When such amount exceeds Rs. 50, but does not exceed Rs. 100, ...	0	8	0
For every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1,000, ...	0	8	0
For every Rs. 500 or part thereof in excess of Rs. 1,000 up to Rs. 10,000, ...	2	8	0
For every Rs-1,000 or part thereof in excess of Rs. 10,000 up to Rs. 30,000, ...	2	8	0
And for every Rs. 10,000 or part thereof in excess of Rs. 30,000, ...	12	8	0

The registration of leases for a period exceeding one year, was made compulsory by S. 13 of Act XVI. of 1864, which came into operation from the 1st January 1865, in the Presidencies of Bengal, Madras and Bombay, as well as by S. 17 of Act XX. of 1866, S. 17 of Act VIII. of 1871, and S. 17 of Act III. of 1877. Excepting Act XVI. of 1864, the rest of the above-mentioned Registration Acts provide that a lease includes a counterpart or a kabuleut.

A CHAPTER FROM THE (NEW CIVIL) PROCEDURE CODE (ACT X. OF 1877.)

CHAPTER II.

Of the Place of Suing.

Court in which suit to be instituted.

15. Every suit shall be instituted in the Court of the lowest grade competent to try it.

Notes.

This section is a mere reproduction of the first line of Section 6 of Act VIII. of 1859.

The amount which is sued for determines the jurisdiction, and not the sum which may eventually, after investigation, be found due to the plaintiff. (Agra, 1856, p. 161.)

Suits to be instituted where subject-matter situate.

16. Subject to the pecuniary or other limitations prescribed by any law, suits

(*a*) for the recovery of immoveable propery,

(*b*) for the partition of immoveable property,

(*c*) for the foreclosure or redemption of a mortgage of immoveable property,

(*d*) for the determination of any other right to or interest to or in immoveable property,

(*e*) for compensation for wrong to immoveable property,

(*f*) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, when the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section 'property' means property situate in British India.

Notes.

This section corresponds with Section 5 of Act VIII. of 1859. It specifies the suits whose forum is fixed with reference to the situation of the subject-matter. Such are suits relating to immoveable property and suits for moveables which have been distrained or attached. It also provides for the venue of suits for compensation for wrongs to immoveble property or to obtain relief respecting land where (as in the case of specific performance of a contract of sale) the relief sought can be obtained through the personal obedience of the defendant. Such suits may be brought either in the Court which has jurisdiction over the land or in the Court which has jurisdiction over the person of the defendant.—*Vide* New York Civil Procedure Code, S. 123.

An objection to jurisdiction cannot be waived by the parties.—1, In. Jur., N. S., p. 319; 14, W. R., p. 228.

As regards "actually and voluntarily residing," "carrying on business" and "personally working for gain" see notes under S. 17 of this Act.

In a case, the plaintiffs, *i. e.*, the owners and occupiers of a house and premises, sued for an injunction to restrain a nuisance caused by certain workshops, forges,

and furnaces erected by the defendants, and for damages for the injury done thereby. *Held*, that the suit was *in personam*, and not a suit "for land or other immoveable property" within the meaning of s. 5 of Act VIII. of 1859.—(10, B. L. R., p. 241.)

Although the Court has no jurisdiction over land or other immoveable property situate beyond the limits of its local jurisdiction, and can make no adjudication as to the right and title to such land, yet, where a party is *personally subject* to the jurisdiction, the Court has power to declare whether or not such party holds such lands subject to a trust.—1, Hyde, 284.

And so a suit may be brought in the Court, in the jurisdiction of which *the defendant is residing*, to recover the rents of land situated out of the Court's jurisdiction, although in such suit the plaintiff's title to the land, of which the rent is sought to be recovered, may incidentally come in question, as the suit itself is not for the land.—6, Bom. H C. Rep. (A. C.) 29.

A suit brought upon a mortgage praying for a decree for the amount due thereunder, and that in default of payment the land mortgaged may be sold, is a suit for land within the meaning of s. 5 of Act VIII. of 1859.—(9, B. L. R. p. 171.)

Suits to be instituted where defendants reside or cause of action arose.

17. Subject to the limitations aforesaid, all other suits shall be instituted in a Court within the local limits of whose jurisdiction—

(*a*) the cause of action arises, or

(*b*) all the defendants, at the time of the commencement of the suit, actually and voluntarily reside, or carry on business, or personally work for gain ; or

(*c*) any of the defendants, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain : provided that either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain as aforesaid acquiesce in such institution.

Explanation I.—Where a person has a permanent dwelling at one place and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.—[*Vide* Pollock, 53.—Ed. *L. C.*]

Explanation II.—A Corporation or Company shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.—[*Vide* Pollock, 53.—Ed. *L. C.*]

Illustrations.

(*a.*) A is a tradesman in Calcutta. B carries on business in Dehli. B, by his agent in Calcutta, buys goods of A, and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Dehli, where B carries on business.—[*Vide* 1, Mad, 200 – ED, *L. C*]

(*b.*) A resides at Simla, B at Calcutta, and C at Dehli. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Dehli, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot be maintained without the leave of the Court. —[*Vide* 3, Mad., 397.—ED., *L. C.*]

Notes.

This section corresponds with s. 5 of Act VIII. of 1859 and s. 4 of Act XXIII. of 1861. It deals with the suits to be instituted where the defendant resides, or where the cause of action arose. The Select Committee in their report says: "The principal changes which we have made are these:—Where there are several defendants, only some of whom reside, &c., within the local limits of the Court's jurisdiction, we think that the suit should not be instituted in the Court unless either (*a*) the leave of the Court is given, or (*b*) the non-residents acquiesce.

When a person residing at Benares made an agreement at Allahabad with a barrister to conduct his case for him, which was then pending in the Court of the Judge of Benares, and it was alleged that an advance of fees had been paid on the specific condition that such advance was to be returned in the event of the barrister not appearing on behalf of the party engaging him, or of his doing no work for him, or of the case being decided in his absence, and it was further alleged that the barrister did not appear at the hearing of the case, and that it was decided in his absence, and that the advance of fees had not been returned. *Held*, in a suit for the recovery of the monies advanced as aforesaid that the cause of action arose at Benares. If the alleged condition was not complied with, and the fees thereby became returnable to the client, it would have been the duty of the barrister to have sought out his creditor at Benares and to have paid him there or have remitted the money to him. (*Semble.*—That a member of the Bar of the High Court residing out of the station in which the High Court is located, but who holds himself out as ready to practice in the High Court, and who goes to the High Court whenever he is engaged to appear there, is one "who personally works for gain" inside of the limits of the station in which the High Court is located within the meaning of s. 5, Act VIII. of 1859.—(6, N. W. P. High Court Reports, p. 43.)

"*Cause of Action.*"—In the case of DeSouza *vs.* Coles, 3, Mad. H. C. Rep., 384, this head of jurisdiction was discussed at great length by Sir A. Bittleston.

The High Court (N. W. P.) has held that the cause of action arises "where the facts that immidiately cause the right to sue have accrued," and that the non-payment of the amount of a bond is a circumstance that would immediately confer the right to sue, and the Court of the place where default is made in payment has

jurisdiction, and not the Court where the bond was executed.—(Full Bench,) 4, H. C. Rep., Agra, 492.

"In one sense it is frequently said that every injury is a cause of action, but no one would suppose it to be sufficient for the plaintiff to state that the defendant had done him an injury, and upon that sole allegation call upon the Court to try a suit. What I understand that a plaintiff is bound to do, is to shew the Court that he relies upon facts, which, if established by proof, will entitle him to the compensation or the relief asked for. If compensation for an injury be the object of the suit, then he must shew the nature of the particular injury complained of and what he claims for compensation; if the object be to compel the defendant to perform some duty, then he must shew the nature of the duty, and the origin of the defendant's liability to perform it, if to recover damages for a breach of contract, then he must state the nature of the contract, how the defendant undertook the performance of it, and how he failed in carrying it out. And I apprehend that, when it is said that the plaintiff must show a *cause of action*, it is meant that he must shew some such facts as these, so that the Court may see whether even in his own statements, he really has, or has not any substantial ground for bringing the suit" *per* Markby, J.—[2, In. Jur., (N. S.) 336.]

Where the plaintiff brought an action to recover money paid by him in Calcutta on hoondees drawn by the defendant beyond the local limits, but sent by him to Calcutta, and there accepted by the plaintiff, *held*, that the whole cause of action arose within the local limits of the Calcutta Court so as to give it jurisdiction within this section.—1, In. Jur. (N S.) 219.

Where A, out of the local limits, drew hoondees on B living within them, against goods to be sent to and sold by B within the same limits, and where these hoondees were negotiated in the ordinary way, *held*, that the whole cause of action, in a suit on the balance of account between the parties, arose within the local limits.—[1, B. L. R., (O. J.) 76.]

The defendant at A, agreed to sell and deliver goods to the plaintiff, the goods to be measured at B, and delivered at C. In default of delivery, the value of the goods should be paid at the market price at A. Default was made. *Held*, in an action to recover the value of the goods at the market rate at A, that the cause of action arose at C. (5, Bom. H. C. Rep. 33.)

A contract is considered to have been made, not where a letter containing an offer has been posted, but where the offer has been received and accepted, not where a treaty has been carried on, and the terms have been discussed and all but settled, but where they are finally assented to by the parties. (3, Mad., 384; 4, Mad. 218.)

"*Actually and Voluntarily residing.*"—Where a man was temporarily imprisoned beyond the Court's jurisdiction, but had his fixed residence and his wife and family within it, *held*, that he was within the jurisdiction for the purpose of a suit under Act XI. of 1865, (7. W. R., p. 349.)

The fixed and permanent home of a man's wife and family, and to which he has always the intention of returning, will constitute his dwelling place within the

meaning of s. 5 of Act VIII. of 1859 and s. 4 of Act XXIII. of 1861. (I. L. R., 1, All. Series, p. 51 and 4. Legal Companion, p. 51.)

The word "dwelling" is synonymous with "place of abode" or "residence"; it is the domicile or home. (1, L. R., Ex., 133; 15, L. J. Ex., 287.)

Mr. Mosely, in his book on County Courts, lays down the following rules regarding the word "dwell"—

1. Sleeping is the chief test of a dwelling.
2. The dwelling must be by consent.
3. It must be with the intention of continuing.
4. It must be an actual dwelling.
5. The sort of habitation is immaterial.

Mere casual presence, or even residence for a temporary purpose, without the intention of remaining, is not "dwelling." A person resided at Coimbatore, but had some cultivation within the local jurisdiction of Ootacamund, to which he came to answer another demand against him; *held*, that he did not "dwell" within the jurisdiction of the Ootacamund Small Cause Court. (2, Madr., 304.)

Where an Officer in the Bombay Staff Corps, holding an appointment in Scinde, came to Bombay on leave for 10 days, and during his stay was served with a writ of summons in an action, the cause of which had arisen in Scinde, it was *held that* he did not "dwell" in Bombay, within the terms of s. 12 of the Charter (1, Bom. H. C. Rep., p. 113)

The word "dwell" cannot be considered applicable to suits against Government, or at all events no distinction can be made between dwelling and carrying on business; for if the Government can be said to dwell any where, it must be in the place where the business of Government is carried on. (1, Madr., 286).

Where the defendant's permanent dwelling was at Benares, but he had gone to Mirzapore before the institution of the suit for a temporary purpose only, it was *held* the Benares Small Cause Court had jurisdiction. (3, All., 121.)

"*Carrying on Business.*"—Where a person who owned a house in Calcutta, which he let to another person, was in the habit of coming once or twice a week as a friend of his tenant, and saw people on business, it was *held* that he carried on business, or worked for gain, within the local limits of the High Court. (2, Hyde, p. 79.)

An individual, or a trading firm, is said to "carry on business" at the head office at which the business is managed. The individual or company does not carry on business at every place at which he or it does business. A builder whose place of business is in one district may undertake extensive works in another district, and visit them frequently; or a wholesale dealer who has a fixed place of business in X., where he sells his goods, may likewise employ travellers who visit different parts of the country, making contracts, and selling goods for him, and also collecting money; yet the builder or trader do not, in the sense of the Letters Patent, "carry on business" elsewhere than at their own permanent places. (30, L. J. Q. B., 331.)

"*Personally working for gain.*"—No remark is necessary.

18. In suits for compensation for wrong done to person or moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another Court, the plaintiff may at his option sue in either of the said Courts.

Suits for compensation for wrongs to person or moveables.

Illustrations.

(a) A, residing in Dehli, beats B in Calcutta. B may sue A either in Calcutta or in Dehli.

(b.) A, residing in Dehli, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Dehli.

(c.) A, travelling on the line of a Railway Company whose principal office is at Howrah, is upset and injured at Allahabad by negligence imputable to the Company. He may sue the Company either at Howrah or at Allahabad.

Note.

This section declares that suits for actionable wrongs may be brought either where the wrong is committed or where the defendant resides.

19. If the suit be to obtain relief respecting, or compensation for wrong to, immoveable property situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be instituted in the Court within whose jurisdiction any portion of the property is situate; provided that, in respect of the value of the subject-matter of the suit, the entire claim be cognizable by such Court.

Suits for immoveable property situate in single districts, but within jurisdictions of different Courts.

If the immoveable property be situate within the limits of different districts, the suit may be instituted in any Court, otherwise competent to try it, within whose jurisdiction any portion of the property is situate.

Suits for immoveable property situate in different districts.

Note.

This section corresponds with s. 11 of Act VIII of 1859; but no longer any sanction is necessary to proceed with the trial of a suit for immoveable property situate within different jurisdictions of the same District or different Districts.

20. If a suit which may be instituted in more than one Court is instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly;

Power to stay proceedings where all defendants do not reside within jurisdiction.

and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them.

In such case, if the plaintiff so requires, the Court shall return the plaint with an endorsement thereon of the order staying proceedings.

Application when to be made.

Every such application shall be made at the earliest possible opportunity, and in all cases before the issues are settled; and any defendant not so applying shall be deemed to have acquiesced in the institution of the suit.

Note.

This section provides that if the Court thinks that justice is more likely to be done by the suit being instituted in another Court, it may stay proceedings, on the application of any defendant, either finally or till further orders.

Remission of court-fee where suit instituted in another Court.

21. Where the Court, under section 20, stays proceedings, and the plaintiff re-institutes his suit in another Court, the plaint shall not be chargeable with any court-fee; provided that the proper fee has been levied on the institution of the suit in the former Court, and that the plaint has been returned by such Court.

Note.

No remark necessary.

Procedure where Courts in which suit may be instituted are subordinate to the same appellate Court.

22. Where a suit may be instituted in more Courts than one, and such Courts are subordinate to the same appellate Court, any defendant, after giving notice in writing to the other parties of his intention to apply to such Court to transfer the suit to another Court, may apply accordingly; and the appellate Court, after hearing the other parties, if they desire to be heard, shall determine in which of the Courts having jurisdiction the suit shall proceed.

Note.

No remark necessary.

Procedure where they are not so subordinate.

23. Where such Courts are subordinate to different appellate Courts, but are subordinate to the same High Court, any defendant, after giving notice in writing to the other parties of his intention to apply to the High Court to transfer the suit to another Court having jurisdiction, may apply accordingly. If the suit is brought in any Court subordinate to a District Court, the application, together with the objec-

tions, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate. The High Court may, after considering the objections, if any, of the other parties, determine in which of the Courts having jurisdiction the suit shall proceed.

Note.

Vide s. 12 of Act VIII. of 1859.

Procedure where they are subordinate to different High Courts.

24. Where such Courts are subordinate to different High Courts, any defendant may, after giving notice in writing to the other parties of his intention to apply to the High Court within whose jurisdiction the Court in which the suit is brought is situate, apply accordingly.

If the suit is brought in any Court subordinate to a District Court, the application, together with the objections, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate,

and such High Court shall, after considering the objections, if any, of the other parties, determine in which of the several Courts having jurisdiction the suit shall proceed.

Note.

Vide s. 13 of Act VIII. of 1859.

Transfer of suits.

25. The High Court or District Court may, on the application of any of the parties, after giving notice to the parties and hearing such of them as desire to be heard, or of its own motion, without giving such notice, withdraw any suit whether pending in a Court of first instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself, or transfer it for trial to any other such subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter.

For the purposes of this section, the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Note.

Corresponds with s. 6 of Act VIII. of 1859. A suit cannot be transferred after evidence has been taken. (Sutherland's Rep., Special Number, 1864, p. 15 and 2, All. H. C. Rep., p. 231); but this objection may be waived by the parties.—(4, Bom. H. C. Rep., p. 98.)

EXAMINATIONS FOR THE CIVIL SERVICE OF INDIA.

REGULATIONS FOR THE OPEN COMPETITION OF 1877.

N. B.—The Regulations are liable to be altered in future years.

1. On March 20th, 1877, and following days, an examination of candidates will be held in London. At this examination not fewer than candidates will be selected, if so many shall be found duly qualified. Of these, will be selected for the Presidency of Bengal [for the Upper Provinces and for the Lower Provinces], for that of Madras, and for that of Bombay.*—Notice will hereafter be given of the days and place of examination.

2. Any person desirous of competing at this examination must produce to the Civil Service Commissioners, before the 1st of February 1877, evidence showing—

(*a*) That he is a natural-born subject of Her Majesty.

(*b*) That his age on the 1st March 1877 will be above seventeen years and under twenty-one years. [*N. B.—In the case of Natives of India this must be certified by the Government of India, or of the presidency or province in which the candidate may have resided.*]

(*c*) That he has no disease, constitutional affection, or bodily infirmity unfitting him, or likely to unfit him, for the Civil Service of India.†

(*d*) That he is of good moral character.

He must also pay such fee as the Secretary of State for India may prescribe.‡

3. Should the evidence upon the above points be *primâ facie* satisfactory to the Civil Service Commissioners, the candidate will, upon payment of the prescribed fee, be admitted to the examination. The Commissioners may, however, in their discretion, at any time prior to the grant of the Certificate of Qualification hereinafter referred to, insti-

* The number of appointments to be made, and the number in each presidency, &c., will be announced hereafter.

† Evidence of health and character must bear date not earlier than the 1st January 1877.

‡ The fee for this examination will be £5, payable by means of a special stamp according to instructions which will be communicated to candidates.

tute such further inquiries as they may deem necessary; and if the result of such inquiries, in the case of any candidate, should be unsatisfactory to them in any of the above respects, he will be ineligible for admission to the Civil Service of India, and if already selected, will be removed from the position of a probationer.

4. The examination will take place only in the following branches of knowledge :—

	Marks.
English Composition, ...	500
History of England—including that of the Laws and Constitution, ...	500
English Language and Literature, ...	500
Language, Literature, and History of Greece, ...	750
,, ,, ,, Rome, ...	750
,, ,, ,, France, ...	375
,, ,, ,, Germany, ...	375
,, ,, ,, Italy, ...	375
Mathematics (pure and mixed), ...	1,250
Natural Science: that is (1) Chemistry, including Heat; (2) Electricity and Magnetism; (3) Geology and Mineralogy; (4) Zoology; (5) Botany, ...	1,000
*** The total (1,000) marks may be obtained by adequate proficiency in any two or more of the five branches of science included under this head.	
Moral Sciences: that is, Logic, Mental and Moral Philosophy, ...	500
Sanskrit Language and Literature, ...	500
Arabic Language and Literature, ...	500

Candidates are at liberty to name, before February 1, 1877, any or all of these branches of knowledge. No subjects are *obligatory*.

5. The merit of the persons examined will be estimated by marks; and the number set opposite to each branch in the preceding regulation denotes the greatest number of marks that can be obtained in respect of it.

6. No candidate will be allowed any marks in respect of any subject of examination unless he shall be considered to possess a *competent knowledge* of that subject.*

* "Nothing can be further from our wish than to hold out premiums for knowledge of wide surface and of small depth. *We are of opinion that a candidate ought to be allowed no credit at all for taking up a subject in which he is a mere smatterer.*"—Report of Committee of 1854. A deduction of marks will be made under each subject, *including Mathematics.*

7. The examination will be conducted by means of printed questions and written answers, and by *vivâ voce* examination, as may be deemed necessary.

8. The marks obtained by each candidate in respect of each of the subjects in which he shall have been examined will be added up, and the names of the candidates who shall have obtained a greater aggregate number of marks than any of the remaining candidates will be set forth in order of merit, and such candidates shall be deemed to be selected candidates for the Civil Service of India, provided they appear to be in other respects duly qualified. Should any of the selected candidates become disqualified, the Secretary of State for India will determine whether the vacancy thus created shall be filled up or not. In the former case the candidate next in order of merit and in other respects duly qualified shall be deemed to be a selected candidate. A selected candidate declining to accept the appointment which may be offered to him will be disqualified for any subsequent competition.

9. Selected candidates before proceeding to India will be on probation for two years, during which time they will be examined periodically, with a view of testing their progress in the following subjects* :—

		Marks.
1.	Oriental Languages—	
	Sanskrit	500
	Vernacular† Languages of India (each) ...	400
2.	The History and Geography of India	350
3.	Law	1,250
4.	Political Economy	350

In these examinations, as in the open competition, the merit of the candidates examined will be estimated by marks, and the number set opposite to each subject denotes the greatest number of marks that can be obtained in respect of it at any one examination. The examination will be conducted by means of printed questions, and written answers, and by *vivâ voce* examination, as may be deemed necessary. The last of these examinations will be held at the close of the second year of probation, and will be called the "final examination," at which it will be

* Full instructions as to the course of study to be pursued will be issued to the successful candidates as soon as possible after the result of the open competition is declared.

† Including, besides the languages prescribed for the several presidencies, such other languages as may, with the approval of the Commissioners, be taken up as subjects of examination.

decided whether a selected candidate is qualified for the Civil Service of India.

10. Any candidate who, at any of the periodical examinations, shall appear to have wilfully neglected his studies, or to be physically incapacitated for pursuing the prescribed course of training, will be liable to have his name removed from the list of selected candidates.

11. The selected candidates who, at the final examination, shall be found to have a competent knowledge of the subjects specified in Regulation IX., and who shall have satisfied the Civil Service Commissioners of their eligibility in respect of age, health, and character, shall be certified by the said Commissioners to be entitled to be appointed to the Civil Service of India, provided they shall comply with the Regulations in force at the time for that Service.

12. Applications from persons desirous to be admitted as candidates are to be addressed to the Secretary to the Civil Service Commissioners, London, S. W., from whom the proper form for the purpose may be obtained.

4th August 1876.

THE Civil Service Commissioners are authorised by the Secretary of State for India in Council to make the following announcements :—

(1.) *Selected candidates will be permitted to choose,* according to the order in which they stand in the list resulting from the open competition as long as a choice remains, the Presidency (and in Bengal the Division of the Presidency) to which they shall be appointed ; but this choice will be subject to a different arrangement should the Secretary of State or Government of India deem it necessary.*

(2.) *No candidate will be permitted to proceed to India before he shall have passed the final examination and received a Certificate of Qualification from the Civil Service Commissioners, or after he shall have attained the age of twenty-four years.*

(3.) *The seniority in the Civil Service of India of the selected candidates shall be determined according to the order in which they stand on the list resulting from the Final Examination.*

(4.) *It is the intention of the Secretary of State to allow the sum of* £50 *after each of the three first half years of probation, and* £150 *after the last half year to each selected candidate who shall have passed the re-*

* This choice must be exercised immediately after the result of the open competition is announced, on such day as may be fixed by the Civil Service Commissioners.

quired examinations to the satisfaction of the Commissioners, and shall have complied with such rules as may be laid down for the guidance of selected candidates.

(5.) *All selected candidates will be required, after having passed the second periodical examination, to attend at the India Office for the purpose of entering into an agreement binding themselves, amongst other things, to refund in certain cases the amount of their allowance in the event of their failing to proceed to India. For a candidate under age a surety will be required.*

(6.) *After passing the final examination, each candidate will be required to attend again at the India Office, with the view of entering into covenants. The stamps payable on these documents amount to £1.*

(7.) *Candidates rejected at the final examination of 1879 will in no case be allowed to present themselves for re-examination.*

CIVIL SERVICE OF INDIA.

FORM OF APPLICATION: TO BE FILLED UP BY CANDIDATES.

*** *This Form must be sent so as to be received at the Office of the Civil Service Commission before the 1st of February 1877.*

Date———————————

SIR,

I BEG to inform you that I desire to be a candidate at the forthcoming examination for the Civil Service of India.

As required by the Regulations, I transmit herewith—

(1) A certificate of my birth, showing that I was born on the day of 18 , and that therefore my age on March 1, 1877, will be above 17 years (complete) and under 21 years.

(1) If a General Register Office certificate cannot be obtained, the instructions printed on the other side will show what evidence should be supplied. If evidence is already in the hands of the Commissioners, strike out "A certificate of my birth," and insert "Evidence is already "in the possession of the Commissioners."

(2) A certificate signed by of my having "no disease, "constitutional affection, "or bodily infirmity, "unfitting me for the Civil Service of India."

(2) The terms indicated by the marks of quotation must appear in the certificate, which must be given after personal examination, and bear date not earlier than 1st January 1877.

(3) Proof of my moral character, viz.—

(1) A testimonial from

(2) A testimonial from

(3) Two testimonials must be sent bearing date not earlier than 1st January 1877. One of them should be given by an intimate acquaintance (not a relative) of not less than three or four years' standing; the other, if the candidate has recently left school, should be given by his late schoolmaster, or if he has had employment of any kind, by his late employer. If the candidate has been at any University, he should send a certificate of good conduct from his college tutor.

(4) A statement of the branches of knowledge in which I desire to be examined, viz.—

(4) If Mathematics be named, state whether pure or mixed, or both are intended; if Natural Science be mentioned, state which branches.

I have also to state, with reference to Section 2, Clause (*a*) of the Regulations, that I am a natural-born subject of Her Majesty.

I am, Sir,
Your obedient Servant,

Name in full ______________________________

Address

To the Secretary,
Civil Service Commission.

EVIDENCE OF AGE TO BE REQUIRED FROM CANDIDATES FOR THE CIVIL SERVICE OF INDIA.

I.—Every candidate born in England or Wales should produce a certificate from the Registrar-General of Births, Marriages, and Deaths, or from one of his Provincial Officers. This certificate may be obtained at Somerset House, or from the Superintendent Registrar of the district in which the birth took place.

II.—A candidate who is a Native of India must have his age certified by the Government of India, or of the presidency or province in which he may have resided.

III.—Every other candidate *not producing the Certificate* mentioned in Clause I. must prove his age by statutory declaration, and should also, if possible, produce a record of birth or baptism from some official

register; under which term may be included the parochial registers of baptisms, the non-parochial registers of baptisms and births deposited at Somerset House under Acts of Parliament, the register kept at the India Office of persons born in India, &c., &c. This Regulation applies—

(1) To all candidates not born in England or Wales.

(2) To candidates who, though born in England or Wales, cannot produce the Registrar-General's certificate.

The Civil Service Commissioners reserve to themselves the right of deciding in each case upon the sufficiency of the evidence produced, but they subjoin the following general rules for the guidance of candidates:—

(*a*) The declaration should specify precisely the date and place of birth, and should, if possible, be made by the father or mother of the candidate. If made by any other person it should state the circumstances which enable the declarant to speak to the fact. If an entry in a Bible or other family record be referred to, the Bible or other record must be produced at the time of making the declaration, and must be mentioned in the declaration as having been so produced.

(*b*) If the candidate was born in England or Wales, the declaration must contain a statement that after due inquiry no entry has been found in the books of the Registrar-General; or a separate declaration must be made to that effect.

(*c*) If no extract from any register is produced, the declaration must contain a statement that after due inquiry no such record is believed to exist; or a separate declaration must be made to that effect.

(*d*) Statutory declarations must be exactly in the form prescribed by the Act of 5 and 6 William IV., c. 62. A printed Form, if required, will be supplied on application to the Civil Service Commissioners.

N.B.—Clergymen, as such, are not qualified to take declarations.

AN ELEMENTARY COURSE OF LAW LECTURES.

Lecture IV.

On Validity of Wills.

The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty—a distinction not known in Hindu law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property (Tyler *v* Walford, 5, Moore, P. C. 304). In the Hindu law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rights which are considered to be beneficial to the deceased.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy. (Domat, 2413).

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in Soorjomonee Dossee *v.* Denobundoo Mullick (6, Moore, I. A., 555): "A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is, that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was

intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in England) an estate of inheritance. If, there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass.

If, again the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize.

If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth, for ever to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his life-time; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law.

This makes it necessary to consider the Hindu Law of Gifts during life and Wills, and the extent of the testator's power, whether in respect of the property he deals with or the person upon whom he confers it. The Law of Gifts during life is of the simplest character. As to ancestral estate it is said to be improper that it should be aliened by the holder, without the concurrence of those who are interested in the succession, but by the law as prevailing in Bengal at least* the impropriety of the alienation does not affect the legal character of the act *(factum valet)*, and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or

* As to Madras see to the same effect Valinayagam Pillai v. Pæhche 1, Madras High Court R., 326, 1, Norton L. C., 334 S. C.

acquired. It applies to all persons in existence, and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Daya Bhaga, chapter I., v. 21, by the phrase " relinquishment in favor of the donee who is a sentient person."

By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence.

As to the case of adopted children it is distinguishable because of the peculiar law applicable to that relation. The Hindu law recognizes an adopted child, whether adopted by the father himself in his life-time, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have oncebeen entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both in England and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman Law, as pointed out by Mr. E. C. Clark in his interesting treatise upon " Early Roman Law," 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his life-time, is, until revocation a continuous act of gift up to the moment of death, and does then operate to give the property dis-

posed of to the persons designated as beneficiaries. They take upon the death of the testator as they would, if he had given the property to them in his life-time. If wills were not universally to be regarded in all repects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

A person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law, be in existence at the death of the testator.

There are exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu law or usage.

Where a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment thereof by a clause that they should not make any division for twenty years, it was held that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once. Mr. Justice Phear in delivering his judgment* said, "I do not think it is competent to him to give the corpus of the property to an adult person and at the same time to forbid that person from enjoying the property in the way which the law allows. The prohibition against receiving and enjoying the income for twenty years, appears to me simply to be a condition imposed on the property which is repugnant to the gift. It is not merely the giving of one portion of the property to one person or purpose, and the remaining portion to another person or purpose; but it is giving the entire property to one person and coupling this gift with a prohibition against his enjoyment. The attempt to do this is I think void in law."

* I. L. R., 1, Calcutta Series, p. 104; 4, Legal Companion, p. 99.

ORDER OF SUCCESSION ACCORDING TO THE SOONEE SCHOOL OF MAHOMMEDAN LAW.

I.—Sharers.

* 1° FATHER. (*a*).—As mere *sharer*, when a son or son's son, how low soever, he takes $\frac{1}{6}$. (β).—As mere *residuary*, when no successor but himself, he takes the whole : or with a sharer, not a child or son's child, how low soever, he takes what is left by such sharer. (γ).—As sharer and residuary, as when there are daughters and son's daughter, but no son or son's son, he, as sharer, takes $\frac{1}{6}$; daughter takes $\frac{1}{2}$, or two or more daughters $\frac{2}{3}$; son's daughter $\frac{1}{6}$; and father the remainder as residuary.

† 2° TRUE GRANDFATHER, *i. e.*, father's father, his father and so forth, into whose line of relationship to deceased no mother enters, is excluded by father and excludes brothers and sisters ; comes into father's place when no father, but does not like father reduce mother's share to $\frac{1}{3}$ of residue, nor entirely exclude paternal grandmother.

† 3° HALF BROTHERS BY SAME MOTHER, take, in the absence of children, or son's descendants, and father and true grandfather, one $\frac{1}{6}$, two or more between them $\frac{1}{3}$. R

* 4° DAUGHTERS ; when no sons, take, one $\frac{1}{2}$; two or more, $\frac{2}{3}$ between them : with sons become residuaries and take each half a son's share. R

† 5° SON'S DAUGHTERS ; take as daughters, when there is no child ; take nothing when there is a son or more daughters than one ; take $\frac{1}{6}$ when only one daughter ; are made residuaries by brother or male cousin how low soever. R

* 6° MOTHER : takes $\frac{1}{6}$, when there is a child or son's child, how low soever, or two or more brothers or sisters of whole or half blood ; takes $\frac{1}{3}$, when none of these : when husband or wife and both parents, takes $\frac{1}{3}$ of remainder after deducting their shares, the residue going to father : if no father, but grandfather, takes $\frac{1}{3}$ of the whole. R

† 7° TRUE GRANDMOTHER, *i. e.*, father's or mother's mother, how high soever ; when no mother, takes $\frac{1}{6}$: if more than one, $\frac{1}{6}$ between them. Paternal grandmother is excluded by both father and mother ; maternal grandmother by mother only. R

* Are always entitled to some shares.

† Are liable to exclusion by others who are nearer.

R Denotes those who benefit by the Return.

† 8° Full Sisters, take as daughters, when no children, son's children, how low soever, father, true grandfather or full brother : with full brother, take half share of male : when daughters or son's daughters, how low soever, but neither sons, nor sons' sons, nor father, nor true grandfather, nor brothers, the full sisters take as residuaries what remains after daughter or son's daughter have had their share. R

† 9° Half Sisters by same Father : as full sisters, when there are none : with one full sister, take $\frac{1}{6}$; when two full sisters, take nothing, unless they have a brother who makes them residuaries, and then they take half a male's share. R

† 10° Half Sisters by Mother only : when no children or son's children how low soever, or father or true grandfather, take, one $\frac{1}{6}$; two or more $\frac{1}{3}$ between them. R

* 11° Husband : if no child or son's child, how low soever, takes $\frac{1}{2}$; otherwise, $\frac{1}{4}$.

* 12° Wife : if no child or son's child, how low soever, takes $\frac{1}{4}$: if otherwise, $\frac{1}{8}$. Several widows' share equally.

Corollary.—*All* brothers and sisters are excluded by son, son's son, how low soever, father or true grandfather. Half brothers and sisters, on father's side, are excluded by these and also by full brother. Half brothers and sisters on mother's side are excluded by *any* child or son's child, by father and true grandfather.

II.—Residuaries.

A.—Residuaries in their own right, being *males* into whose line of relationship to the deceased no *female* enters.

(a)—Descendants.

1. Son.
2. Son's son.
3. Son's son's son.
4. Son of No. 3.
   - 4A. Son of No. 4.
   - 4B. And so on, how low soever.

---

* Are always entitled to some shares.

† Are liable to exclusion by others who are nearer.

R Denotes those who benefit by the Return.

(b).—Ascendants.

5. Father.
6. Father's father.
7. Father of No. 6.
8. Father of No. 7.
    8A. Father of No. 8.
    8B. And so on, how high soever.

(c).—Collaterals.

9. Full brother.
10. Half brother by father.
11. Son of No. 9.
12. Son of No. 10.
    11A. Son of No. 11.
    12A. Son of No. 12.
    11B. Son of No. 11A.
    12B. Son of No. 12A.
    And so on, how low soever.
13. Full paternal uncle.
14. Half paternal uncle.
15. Son of No. 13.
16. Son of No. 14.
    15A. Son of No. 15.
    16A. Son of No. 16.
    And so on, how low soever.
17. Father's full paternal uncle by father's side.
18. Father's half paternal uncle by father's side.
19. Son of No. 17.
20. Son of No. 18.
    19A. Son of No. 19.
    20A. Son of No. 20.
    And so on, how low soever.
21. Grandfather's full paternal uncle by father's side.
22. Grandfather's half paternal uncle by father's side.
23. Son of No. 21.
24. Son of No. 22.
    23A. Son of No. 23.
    24A. Son of No. 24.
    And so on, how low soever.

N. B.—a. A nearer Residuary in the above Table is preferred to and excludes a more remote.

β. Where several Residuaries are in the same degree, they take *per capita*, not *per stirpes*, *i. e.*, they share equally.

r. The whole blood is preferred to and excludes the half blood at each stage.

B.—Residuaries in another's right, being certain females, who are made residuaries by males parallel to them ; but who, in the absence of such males, are only entitled to legal shares. These female Residuaries take each half as much as the parallel male who makes them Residuaries.

1. Daughter made Residuary by son.
2. Son's daughter made Residuary by son's son.
3. Full sister made Residuary by full brother.
4. Half sister by father made Residuary by *her* brother.

C.—Residuaries with another, being certain females who become residuaries with other females.

1. Full sisters with daughters or daughters' sons.
2. Half sisters by father.

N. B.—When there are several Residuaries of different kinds or classes, *e. g.*, residuaries in their own right and residuaries with another, propinquity to deceased gives a preference : so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first.

If there be Residuaries and no Sharers, the Residuaries take all the property.

If there be Sharers, and no Residuaries, the Sharers take all the property by the doctrine of the "Return." Seven persons are entitled to the Return. *1st*, mother ; *2nd*, grandmother ; *3rd*, daughter ; *4th*, son's daughter ; *5th*, full-sister ; *6th*, half-sister by father ; *7th*, half-brother or sister by mother.

A posthumous child inherits. There is no presumption as to commorients, who are supposed to die at the same time unless there be proof otherwise.

If there be neither Sharers nor Residuaries, the property will go to the following class (Distant Kindred).

III.—Distant Kindred.

Comprising all relatives, who are neither Sharers nor Residuaries.

CLASS. 1.

Descendants ; Children of daughters and son's daughters.

1. Daughter's son.
2. Daughter's daughter.
3. Son of No. 1.
4. Daughter of No. 1.
5. Son of No. 2.
6. Daughter of No. 2, and so on, how low soever, and whether male or female.
7. Son's daughter's son.
8. Son's daughter's daughter.
9. Son of No. 7.
10. Daughter of No. 7.
11. Son of No. 8.
12. Daughter of No. 8, and so on, how low soever, and whether male or female.

N. B. (*a*)—Distant kindred of the first class take according to proximity of degree ; but, when equal in this respect those who claim through an heir, *i. e.*, sharer or residuary, have a preference over those who claim through one not an heir.

(β)—When the sexes of their ancestors differ, distribution is made having regard to such difference of sex, *e. g.*, daughter of daughter's son gets a portion double that of son of daughter's daughter, and when the claimants are equal in degree, but different in sex, males take twice as much as females.

CLASS 2.

Ascendants ; False grandfathers and false grandmothers.

13. Maternal grandfather.
14. Father of No. 13, father of No. 14, and so on, how high soever (*i. e.*, all false grandfathers).
15. Maternal grandfather's mother.
16. Mother of No. 15, and so on, how high soever (*i. e.*, all false grandmothers).

N. B.—Rules (*a*) and (β), applicable to class 1, apply also to class 2. *Further* (γ) when the sides of relation differ, the claimant by the *paternal* side gets twice as much as the claimant by the *maternal* side.

CLASS 3.

Parents' Descendants.

17. Full brother's daughter and her descendants.
18. Full sister's son.
19 „ „ daughters and their descendants, how low soever.
20. Daughter of half brother by father, and her descendants.
21. Son of half sister by father.
22. Daughter of half sister by father, and their descendants, how low soever.
23. Son of half brother by mother.
24. Daughter of half brother by mother and their descendants, how low soever.
25. Son of half sister by mother.
26. Daughter of half sister by mother, and their descendants, how low soever.

N. B.—Rules (α) and (β) applicable to class 1 apply also to class 3. *Further*, (δ) when two claimants are equal in respect of proximity, one who claims through a residuary is preferred to one who cannot so claim.

CLASS 4.

Descendants of the two grandfathers and the two grandmothers.

27. Full paternal aunt and her descendants.*
28. Half paternal aunt and her descendants.*
29. Father's half brother by mother and his descendants.*
30. Father's half sister by mother and her descendants.*
31. Maternal uncle and his descendants.*
32. Maternal aunt and her descendants.*

N. B. (ε)—The *sides* of relation being equal, uncles and aunts of the whole blood are preferred to those of the half, and those connected by same father only, whether males or females, are preferred to those connected by the same mother only, (ζ) Where sides of relation differ, the claimant by paternal relation gets twice as much as the claimant by maternal relation. (θ) Where sides and strength of relation are equal, the male gets twice as much as the female.

GENERAL RULE.—Each of these classes excludes the next following class.

IV.—SUCCESSOR BY CONTRACT OR MUTUAL FRIENDSHIP. V.—SUCCESSOR OF ACKNOWLEDGED KINDRED. VI.—UNIVERSAL LEGATEE. VII.—PUBLIC TREASURY.

* Male or female, and how low soever.

PRIVY COUNCIL.

The 24th, 25th and 28th November, 1876.

PRESENT :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from Calcutta High Court.

ABEDOONISSA KHATOON* (Defendant) *Appellant,*

vs.

AMEEROONISSA KHATOON (Plaintiff) *Respondent.*

Execution Proceedings—Jurisdiction—Sect. 208 *of Act VIII. of* 1859—*Sect.* 11 *of Act XXIII. of* 1861.

The widow of a decree-holder, having been substituted on the record under sect. 103 of Act VIII. of 1859 for the purpose of prosecuting an appeal, applied for execution on behalf of herself and as guardian of her infant son, whose legitimacy as a son of the deceased decree-holder was disputed and eventually decided in such execution proceeding, and obtained a declaration that she was entitled to execute the whole of her decree against the judgment-debtor.

In a suit by the widow of the judgment-debtor to set aside this judgment, *held,* that the above issue of legitimacy had not been decided by a competent Court in a competent proceeding.

Neither sect. 208 of Act VIII. of 1859, nor sect. 11 of Act XXIII. of 1861 authorized the Court to try the above issue of legitimacy in an execution proceeding, the infant son not having been a party to the suit in which the judgment was passed.

SIR ROBERT P. COLLIER :—The facts necessary to the understanding of the question which arises in this appeal may be thus shortly stated :

Wahed Ali brought a suit against his father *Abdool Ali* to recover the possession of a considerable quantity of landed property, and it may be enough for the present purpose to describe the subject of contention between them thus: The father had executed certain hibbanamahs in favour of his son when that son was an infant. It was alleged on the part of the father that the son had subsequently executed certain ikrarnamahs, whereby he divested himself of the benefit which he derived under the previous hibbanamahs. The Court of first instance dismissed the suit of the son, with the exception of that part which related to some property which he derived from his mother, and about which no question arose. Upon that *Wahed* appealed to the High Court. Pend-

* *Vide* 4, Law Reports, Indian Appeals, p. 66.

ing the appeal, *Wahed* died : and thereupon the High Court, as it appears to their Lordships, under the powers given them by sect. 103 of Act VIII. of 1859, substituted his widow *Abedoonissa* for *Wahed* for the purpose of prosecuting the appeal. The appeal was prosecuted; the High Court found the ikrarnamahs to have been invalid, and reversed the decision of the Court below. The Court observe that since the death of *Wahed* "disputes have arisen, and litigation is now pending concerning his proper legal representative ; and for the purpose of prosecuting this appeal we have admitted his widow *Mussumat Abedoonissa Khatoon* to be his legal representative." At the conclusion of the judgment they thus express themselves : "The decree of the Court below is reversed, with costs. Confining ourselves to the matters in issue in the present suit, our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents. We shall declare that Moulvi *Wahed Ali* was, in his life-time, and that those who are now by law his heirs and representatives are, entitled to a decree for setting aside the documents relied upon by the Respondents, and for the recovery of the property sued for." It is to be observed that the decree drawn up in pursuance of this judgment does not conform to that portion of the judgment in which it is said that the representatives of *Wahed* are entitled to a decree for the recovery of the property sued for. The decree is in these terms :—"It is declared that the several ikrarnamahs and miras pottahs, dated respectively the 29th Falgoon, 1259, 16th Aughran, 1263, 6th Jeyt, 1264, and the 15th Aughran, 1263, were of no effect, and void against Moulvi *Wahed Ali* in his life-time, and are void against his lawful representatives. And it is further ordered and decreed that the Defendants, Respondents, who appeared in this appeal, do pay to the Plaintiffs, Appellants, the sum of Rs. 3,000." So, in fact, all that could be executed under this decree is the order for costs, the rest of the decree being declaratory only.

It has been argued, however, that the decree ought to be taken to be in conformity with the judgment. Their Lordships are, by no means, satisfied that this decree *improvide emanavit*. If it were necessary, they would be disposed to take it as it stands, and to declare that the rights of the parties were determined by it. But in the view which they take of the case it is not necessary to decide this point; and it may be assumed for argument's sake that the decree is in conformity with the latter words of the judgment which have been read.

An appeal was preferred from this judgment to Her Majesty in Council, and in 1875, the judgment was reversed. In the meantime, however, pending the appeal, certain execution proceedings were taken. The widow *Abedoonissa* applied for execution on behalf of herself, and also, in a different character, as guardian of an infant son, *Wajed Ali*, whom she alleged to have been born to her husband after her husband's death. The legitimacy of this child was disputed by *Abdool Ali*. Certain other parties also applied for execution, Messrs. *Wise* and *Dunne*; but as nothing appears to turn on the proceedings taken by them, no further mention will be made of them.

The Judge of *Dacca*, before whom the case originally came, appears to have held that he had no jurisdiction in a mere execution proceeding to determine such a question as the legitimacy or the illegitimacy of *Wajed Ali*, the son whom the widow had put forward as being legitimately born to *Wahed*. Unfortunately, we have not the original judgment of the Judge of *Dacca* before us. But we come to the conclusion that the Judge so decided, from the first order of the High Court on remand and what proceeded from the Judge upon the remand. The High Court, in remanding the case, made these observations: "The Lower Court has assigned no good reason whatever for not entertaining and disposing of the application for execution made in this case. Under sections 102 and 103, and section 208 of Act VIII. of 1859, the case may, so far as anything has been shewn to us to the contrary, be perfectly well disposed of without a separate regular suit." And thereupon they remanded the case to be disposed of by the Judge of *Dacca*, and directed him to determine the question of the legitimacy of *Wajed Ali*. After a second remand, this question was heard and decided by the Judge of *Dacca* and decided against the widow, the Judge holding that *Wajed Ali* was supposititious. Subsequently, on appeal, the same matter came before the Court; and two Judges of the High Court reversed the judgment of the Judge of *Dacca*, and held that *Wajed Ali* was the legitimate son of *Wahed*. They refer to the proceedings in this manner: They state: "The question that is now before us is, whether the person who goes by the name of *Wajed Ali* is or is not a posthumous son of the said *Wahed Ali*; and whether, therefore, one *Abedoonissa* who is admittedly the guardian of *Wajed Ali*, if there is such a person in reality, is entitled to execute the said decree partly in her own right and partly as mother and guardian of the said *Wajed Ali*,"—and they decree,—

"that *Abedoonissa* be declared entitled to execute the whole of her decree against the judgment-debtor before us,"—that is, in her two capacities, partly for herself and partly in her new capacity of guardian of *Wajed Ali.* It appears to their Lordships, that she, in her character of guardian of *Wajed Ali,* became a new party in these proceedings, just to the same extent that *Wajed Ali* would have become himself if, after he had come of age, he had appeared by his attorney.

Upon this, *Abdool Ali* having died, his widow *Ameeroonissa* instituted the present suit for the purpose of setting aside the last judgment which has been referred to mainly upon two grounds; in the first place, that in an execution proceeding it was not competent to the Court to entertain such a question as the legitimacy of *Wajed;* and secondly, upon the merits. On the other hand, *Abedoonissa* contends that the suit is not maintainable, because the very question has been decided between the same parties in a previous suit by a Court of competent jurisdiction. In other words, she pleads *res judicata,* and she also joins issue upon the merits.

As far as the merits are concerned, both Courts have found that *Wajed* was not the son of *Wahed;* and the sole question before their Lordships is this, whether this question is *res judicata* or not. There is no doubt that in the execution proceeding, which has been referred to, the very same issue was tried between the same parties. The sole question is, whether the Court has jurisdiction in such a proceeding to try it.

Some attempt was made to establish that *Abdool* had originally consented to the exercise of this jurisdiction, but their Lordships cannot assume this. The inference appears to them the other way. They have not the record of the first proceeding before the Judge of *Dacca;* but the Judge of *Dacca* decided that he had not jurisdiction to determine the question in that suit. It appears to their Lordships that it ought not to be assumed that he would have come to that conclusion unless the objection had been raised; the assumption would be the other way. They cannot, therefore, assume consent even if consent would have given jurisdiction in such a case.

The question, whether the jurisdiction existed or not, depends entirely upon the construction of certain sections in two Acts which have been referred to; the first being Act VIII. of 1859, and the second Act XXIII. of 1861. The sections of the first Act relied upon by the Court in their first remand are sections 102, 103, and 208. The first

sections, 102 and 103, relate to the substitution, in the case of the death of a sole Plaintiff or surviving Plaintiff, of a legal representative of such Plaintiff. The 102nd section refers to cases where there is no dispute. Sect. 103 is the section which, as before observed, was acted upon in this case, when *Abedoonissa* was allowed to prosecute the suit, and is to this effect: "If any dispute arise as to who is the legal representative of a deceased Plaintiff, it shall be competent to the Court either to stay the suit until the fact has been determined in another suit, or to decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit." Under the terms of this section, it not being decided by the Court that *Abedoonissa* was the legal representative of her husband, she was admitted "for the purpose of prosecuting the suit"; those being the very words used by the Court in their judgment. This section manifestly cannot apply to the case of *Wajed*, because this section, which comes under the heading of "Proceeding before Judgment" has reference only to a state of things existing before the hearing of the suit or at the hearing of the suit; and before and at the hearing of the suit there was no suggestion whatever that *Wajed* had any interest whatever in it. Then we come to sect. 208, which undoubtedly is a section relating to proceedings for execution and after judgment and decree. It is to this effect:—"If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred, or his pleader; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder." It appears to their Lordships, in the first place, that, assuming *Wajed* to have the interest asserted, the decree was not, in the terms of this section, transferred to him, either by assignment, which is not pretended, or by operation of law, from the original decree-holder. No incident had occurred, on which the law could operate, to transfer any estate from his mother to him. There had been no death; there had been no devolution; there had been no succession. His mother retained what right she had; that right was not transferred to him; if he had a right, it was derived from his father; it appears to their Lordships, therefore, that he is not a transferree of a decree within the terms of this section.

Their Lordships have further to observe that they agree with the Chief Justice in the view which he expressed: that this was not a section intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. It was not intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir. They are further fortified in this view by the consideration that under sect. 364 of this Act no appeal would lie from any judgment or decision given in a proceeding under sect. 208; it appears difficult to suppose that such an important question as this should be triable without appeal. Therefore, in their Lordships' view, agreeing with that of the Chief Justice, sect. 208 does not apply. Even if it did apply, it would appear to their Lordships that inasmuch as proceedings under it are not subject to appeal probably a suit would lie for the purpose of reversing an order made in pursuance of it.

Act VIII. then being disposed of, we next come to the second Act, Act XXIII. of 1861. The sole section relied upon has been the 11th, which is in these terms: "All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suits, and the order passed by the Court shall be open to appeal." Their Lordships quite accede to the view of the learned counsel for the Appellant, that this section was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an appeal from decisions in such trials; but the question narrows itself to this, whether the present case comes under these words: "Any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree." There must be two conditions to give the Court jurisdiction. The question must be between parties to the suit, and must relate to the execution of the decree.

Their Lordships are of opinion that it would be straining the words

of this section beyond any legitimate construction which could be put upon them to apply them to the present case. In their judgment *Wajed Ali* appearing by his mother (and as before observed it would have been the same thing if he had been of age and had appeared in the usual way by his attorney or mooktear), was in no proper sense of the word a party to this suit. No rights of *Wajed Ali* were determined or considered in the suit. He was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree; but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit. Their Lordships are therefore of opinion that this section does not apply.

Under these circumstances their Lordships have come to the conclusion that the issue that had been referred to in the case was not *res judicata* by a competent Court in a competent proceeding; and for this reason they will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

HIGH COURT, N. W. P.

The 21st August, 1876.

PRESENT:

Mr. Justice Turner and Mr. Justice Spankie.

MANNA LAL* (Defendant) *Appellant,*

versus

The BANK of BENGAL (Plaintiff) *Respondent.*

Act IX. of 1872 (*Contract Act*) *ss.* 2 (*d*), 25—*Consideration—Agreement without Consideration—Void Agreement.*

Where the acceptor of certain *hundis* gave a mortgage of his immoveable property to the holder of the hundis as security for the payment of the hundis in the event of their dishonour when they became due. *Held,* in a suit on the mortgage-deed, the hundis having been dishonoured, that there was no consideration, within the meaning of that term in Act IX. of 1872, for the agreement of mortgage, and the same was void under s. 25 of that Act.

One Rai Lukshmi Chand, of Benares, drew two hundis, each for Rs. 2,500, the one payable on the 15th June, 1874, the other on the

* *Vide* I. L. R., 1., All., p. 309.

19th June 1874, on the defendant's firm at Cawnpore. These hundis were endorsed to the Bank of Bengal and discounted by the agent of that Bank at Benares, and were then forwarded to the agent of the Bank at Cawnpore, and by him presented to the defendant and accepted. On the 18th May, 1874, the agent at Cawnpore was informed that the drawer of the hundis was bankrupt. He immediately applied to the defendant to give security for the amount of the hundis, and on the 21st May, 1874, the defendant executed a deed of mortgage for Rs. 5,000. This suit was brought to recover that sum.

JUDGMENT.—* * * * But we must admit the validity of the plea that the contract of mortgage is void under the provisions of s. 25 of the Contract Act. We do not quite understand the Judge's argument as to the benefit which the appellant derived from the banking transaction. It does not appear that he had received any portion of the hundis when discounted, but assuming that he had done so, and admitting that under the circumstances he was liable on the hundis, neither the antecedent benefit, nor the existing liability, nor the anticipated advantage to which the Judge alludes, would constitute a consideration as defined in the Contract Act. To constitute a consideration as defined in that Act there must be an act, abstinence, or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found there was no such act, abstinence, or promise, and therefore there was no consideration for the mortgage, and the contract is void. On this ground we must allow the appeal, and reversing the decrees of the Courts below so far as they decree the claim, we must dismiss the suit with costs.

CALCUTTA HIGH COURT.

PRESENT:

Mr. Justice Pontifex.

POORNO CHUNDER COONDOO.*

versus

PROSONNO COOMAR SIKDAR and another.

Limitation—Act IX. of 1871, *Sched. II. cl.* 157—*Execution of Ex parte Decree.*

Mere notice of execution of decree is not sufficient "process for enforcing" it within the meaning of cl. 157, Sched. II., Act IX. of 1871. Such process means actual process by attachment in execution of the person or property of the debtor.

* *Vide* I. L. R , 2, Calc. Series, p. 123.

PONTIFEX, J.—I have very little doubt that process of execution means actual process by attachment in execution of the judgment-debtor's person or property. The case of *Obhoy Churn Dutt*† vs. *Mudoo Soodun Chowdry* is opposed to this: but I prefer the decision in *Shib Chunder Bhadooree*‡ vs. *Luckhee Debia Chowdrain.* In my opinion mere notice of execution is not sufficient process for enforcing the decree.

A CHAPTER FROM THE (NEW CIVIL) PROCEDURE CODE (ACT X. OF 1877.)

CHAPTER III.

OF PARTIES AND THEIR APPEARANCES, APPLICATIONS AND ACTS.

Persons who may be joined as plaintiffs.

26. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court in disposing of the costs of the suit otherwise directs.

Notes.

This is a new provision. It is founded to some extent on the New York Code, s. 117. The "Common Law Procedure Act, 1860," 23 and 24 Vict. c. 126, s. 19, provides that "the joinder of *too many plaintiffs* shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favor of the plaintiffs by whom the action is brought, or of one or more of them, or in case of any question of misjoinder being raised, then in favor of such one or more of them as shall be adjudged by the Court to be entitled to recover: provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favor judgment is not given, unless otherwise ordered by the Court or a Judge."

Para. 1 of the "Memorandum of Practice in the trials of Civil Suits." 4, Legal Companion, p. 225 says "It should appear in the plaint that the persons, if more than one, who sue together as plaintiffs, *all* jointly as a whole and not some of them only, have the right, which it is the object of the suit to vindicate." But this section says that all persons who may be *jointly*, *severally* or *in the alternative*, (interested in the subject-matter of the suit or) entitled to the relief

† 5, Wym., p. 172. ‡ 6, W. R. Mis., 51.

sought for may be joined as plaintiffs. A person may be interested in the property to which the suit relates, and yet his interest may be such as cannot be affected by the decree. As, if land be so settled that it will undoubtedly belong to A at the death of B, but there is a suit between B and C as to the possession of the land during the life of B only; A is interested in the land which forms the subject-matter of the suit, but he is not interested in that which is demanded by the plaint, and his interest cannot be affected by the decree. A, therefore, need not be a party to such a suit.

Court may substitute or add plaintiff for or to plaintiff suing.

27. Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may, if satisfied that the suit has been so commenced through a *boná fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as the Court thinks just.

Note.

This is a new provision. The mistake must be a *boná fide* one.

Persons who may be joined as defendants.

28. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Notes.

Vide New York Civil Procedure Code, s. 118. Where a plaintiff sought for a declaratory decree that a certain thakbust map and the boundary line therein set forth are wrong, and brought one suit against the proprietors of the three different estates lying on a particular side of the line; and it was not shown that the case was the same as regards the estates of the three defendants. Peacock, C. J., in delivering judgment, said "It by no means follows that because it may be wrong as to one, it is also wrong as to the others. Although the plaintiff is interested in shewing that the whole line is wrong, the defendants are interested only so far as their respective lands are concerned, and each of the defendants may have a separate case and different witnesses to prove that the line is laid down correctly so far as his estate is concerned. The Principal Sudder Ameen says that the plaintiffs were wrong in joining these several defendants in one suit, and on that ground he substantially rejected the plaint. In a recent Full Bench* decision the Court pointed out the inconvenience of joining in one case a number of defendants whose cases might be wholly distinct from each other. If the plaintiff

* *Vide* 8, W. R., p. 15.

is correct in joining these three defendants in one suit, he might have found 20 different defendants if there had been as many separately interested in maintaining the correctness of the thakbust map in as many different parts of it of which the plaintiff had an interest to dispute the correctness. In that case, a suit was brought against several defendants, each of whom claimed under a separate sale made by the father of a joint Hindoo family under the Mitakshara. The Court, in delivering judgment, made the following remarks :—'It is very inconvenient that a suit of this nature should be brought against a number of defendants whose interests are altogether distinct from each other. Section 8 of Act VIII. of 1859 allows causes of action to be joined in the same suit by and against the same parties. But there is no Clause which authorizes different causes of action to be joined in one suit against different parties where each of those parties has a distinct and separate interest. In this case, the validity of the different deeds depends each upon its own merits. It would be just as reasonable to sue four different defendants on bonds given by each of them or even to join them with a few other defendants for trespassing on the plaintiff's lands, as it was to join all the defendants in the present suit. Such a joinder in one suit of distinct causes of action against different defendants, each of whom is unconnected with the cause of action against the other, complicates the case before the Judge, and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him though admissible against one or more of the others. Moreover, it is vexatious and harassing to the different defendants. Such a procedure renders it almost compulsory on all the defendants to be present, either in person, or by their pleaders, whilst the case is going on against the others in respect of matters in which they are not interested; moreover, it is harassing and inconvenient as regards the attendance of the witnesses of the several defendants, as it renders it necessary for the witnesses of each to be present and to be detained whilst the case of the others is being heard and determined. Again, in appeal, each case must be argued as a separate and distinct case. I think, therefore, that the Judges below ought to be more careful, and to reject plaints when brought against several defendants for causes of action which have occurred against each of them separately, and in respect of which they are not jointly concerned.' "* It is not an inflexible rule that all the defendants must have a joint interest in all the matters of the suit. S. 31 of this Act provides that no suit shall be defeated by reason of the misjoinder of parties. In the event of serious multifariousness being discovered, the Court should require the plaintiff to elect which cause of action he will proceed to trial upon, and should direct the remainder of the plaint to be withdrawn. 4, Legal Companion, p. 227.

Joinder of parties liable on same contract.

29. The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundís and promissory notes.

* *Vide* 8, W. R., p. 64.

Notes.

Vide New York Civil Procedure Code, s. 120. In the case of RICE° *vs.* SHUTE, Lord Mansfield in delivering judgment said "To be sure, a distinction is to be found in the books, between *torts* and *assumpsits*—'that in torts, all the trespassers need not be made parties; but in actions upon contract every partner must be made a defendant.' Many non-suits, much vexation, and great hindrance to justice, have been occasioned by this distinction. It must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the plaintiff's demand. But experience shows that convenience, as well as justice, lies the other way. All contracts with partners are joint and several: every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves. A creditor knows with whom he dealt: but he does not know the secret partner. He may be non-suited twenty-times before he learns them all; or driven to a suit in equity, for a discovery, 'who they are.' It is cruel to turn a creditor round, and make him pay the whole costs of a non-suit, in favor of a defendant who is certainly liable to pay his whole demand; and who is not injured by another partner's not being made defendant; because, what he pays, he must have credit for in his account with the partnership. Upon this point I very early consulted the three other Judges of this Court, Mr. Justice *Denison*, Mr. Justice *Foster*, and Mr. Justice *Wilmot*. They were all of opinion, 'that the defendant ought to plead it in abatement:' he then must say 'who the partners are.' If the defendant does not take advantage of it at the beginning of the suit, and plead it in abatement, it is a waiver of the objection. He ought not to be permitted to lie by, and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded in the merits of the cause, but on the form of proceeding. The old cases make no distinction between the plaintiffs knowing of a partnership or not. Here, indeed, the plaintiff knew of it: but the present defendant was the person with whom he transacted. He must be allowed this, in his account with the other partners. No injustice is done to the defendant, by allowing the plaintiff to recover; but great injustice is done to the plaintiff, by allowing the non-suit to stand; and what is still worse, a mode of litigation allowed which is highly inconvenient."

One party may sue or defend on behalf of all in same interest.

30. Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable), then by public advertisement, as the Court in each case may direct.

Vide Smith's Leading Cases, Vol. I., p. 511.

Notes.

Vide New York Civil Procedure Code, s. 119.

When the question is one of common or general interest of so many persons that it is impracticable to bring them all before the Court, one or more may sue or defend on behalf of the whole, the reason thereof being stated in the plaint. But if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be joined as a defendant, the reason thereof being stated in the plaint. The plaint should distinguish the defendants, against whom relief is sought, from the others.*

Suit not to fail by reason of misjoinder.

31. No suit shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

Note.

Hence it will appear that the plea of misjoinder is not a fatal plea.

Court may dismiss or add parties.

32. The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out ;

and the Court may at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

No one to be added as plaintiff or as next friend without his consent.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Parties to suits instituted or defended under section 30.

Any person on whose behalf a suit is instituted or defended under section 30 may apply to the Court to be made a party to such suit.

* *Vide* 4, Legal Companion, p. 225.

All parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, section 22) the proceedings as against them shall be deemed to have begun only on the service of such summons.

Defendants added to be served.

The Court may give the conduct of the suit to such plaintiff as it deems proper.

Conduct of suit.

Note.

This is a new and a very important provision. This section should be very carefully studied.

33. Where a defendant is added, the plaint, if previously filed, shall, unless the Court direct otherwise, be amended in such manner as may be necessary, and an amended copy of the summons shall be served on the new defendant and the original defendants.

Where defendant added, plaintiff to amend.

Note.

No remark seems to be necessary.

34. All objections for want of parties, or for joinder of parties who have no interest in the suit, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the first hearing; and any such objection not so taken shall be deemed to have been waived by the defendant.

Time for taking objections as to non-joinder or misjoinder of parties.

Note.

No remark is necessary.

35. When there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding under this Code: and in like manner when there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any such proceeding.

Each of several plaintiffs or defendants may authorize any other to appear, &c., for him.

The authority shall be in writing, signed by the party giving it, and shall be filed in Court.

Authority to be in writing signed and filed.

Note.

Corresponds with s. 115 of Act VIII. of 1859.

Where one of several representatives of a deceased judgment-creditor applies for the execution of a decree, the general powers of attorney contemplated by s. 17,

clause 1, (of Act VIII. of 1859) are not necessary; but it is sufficient, if the applicant is authorized under s. 115 of Act VIII. of 1859 to act for the other representatives. 2, Bom. H. C. Rep., (A. C.) p. 103.

Recognized Agents and Pleaders.

Appearances, &c., may be in person, by recognized agent or by pleader.

36. Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to a suit or appeal in such Court, may, except when otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf:

Provided that any such appearance shall be made by the party in person if the Court so direct.

Note.

Corresponds with s. 16 of Act VIII. of 1859.

An advocate of the High Court is entitled to appear and plead on the Appellate side, but not to *file* an appeal. A petition of special appeal had been signed and certified, and filed by an Advocate of the Court. *Held* that a Barrister who is an Advocate of the Court, who can plead only, is not authorized to file an appeal. 13, Suth. W. R., p. 60.

Recognized agents.

37. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

Persons holding powers-of-attorney from parties out of jurisdiction.

(*a*) persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

Certificated mukhtárs.

(*b*) mukhtárs duly certificated under any law for the time being in force, and holding special powers-of-attorney authorizing them to do, on behalf of their principals, such acts as may legally be done by mukhtárs;

Persons carrying on trade or business for parties out of jurisdiction.

(*c*) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

Nothing in the former part of this section applies to the territories now administered respectively by the Lieutenant Governor of the Panjáb, and the Chief Commissioners of Oudh and the Central Provinces; but in those territories the recognized agents of parties by whom such appearances, applications and acts may be made and done shall be such persons as the Local Government may from time to time, by notification in the official Gazette, declare in this behalf

Recognized agents in Pánjab, Oudh and Central Provinces

Notes.

Corresponds with s 17 of Act VIII of 1859

The Select Committee in their report say — We have provided that certificated mukhtárs holding special powers of attorney may be recognized agents and declared that in the Panjab, Oudh and the Central Provinces recognized agents shall be such persons as the Local Government may by notification declare This will enable the Local Government to keep if it think fit, the special rules on this subject now in force in those territories

This section does not empower mukhtárs to *present* applications in Civil Courts. Certificated mukhtárs holding special powers of attorney may only do such acts as may be legally done by mukhtárs They can neither present applications nor plead in the Civil Court A mukhtár having once *presented* an application for the execution of a decree under s 207, Act VIII of 1859 on behalf of his client decree holder in the Moonsiff's Court at Boalia his application was returned on the ground that it ought to have been presented through a pleader The matter having been subsequently brought before the Calcutta High Court Markby and Lawford, J J, confirmed the decision of the Moonsiff holding that "as a general principle, a party who makes * an application must be ready and qualified to support it if the Court calls upon him to do so But by law the mukhtar is not so qualified *Vide* 4 Legal Companion p 47

If a party is present within the jurisdiction of the Court when the suit is commenced, another person though carrying on trade and business for and in the name of such party cannot be his recognised agent within the meaning of s 17, cl 2 (Act VIII of 1859) and has not authority to present a plaint on his behalf, or to appoint a pleader for him (6 Bom, 159)

Under cl 2 of section 17 of Act VIII of 1859, it has been decided that a partner is not a recognized agent within the meaning of this clause, which has reference to such an agent as a gomastah or person acting for others, not (as in the case of a partner) carrying on business in the name of the firm, and for the benefit of himself and partners Thus, service of a summons intended for one partner of a firm who was out of the jurisdiction, was made upon another partner who was within it This was *held* not to be a sufficient service 1, Hyde, 97

38. Processes served on the recognized agent of a party to a suit or appeal shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

Service of process on recognized agent

The provisions of this Code for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

Note.

Corresponds with s 17 of Act VIII of 1859.

39. The appointment of a pleader to make or do any appearance, application or act as aforesaid shall be in writing, and such appointment shall be filed in Court.

Appointment of pleader

When so filed, it shall be considered to be in force until revoked with the leave of the Court, by a writing signed by the client and filed in Court, or until the client or the pleader dies, or all proceedings in the suit are ended so far as regards the client

No advocate of any High Court established by Royal Charter shall be required to present any document empowering to act

Note

Corresponds with s 18 of Act VIII of 1859

This section makes an additional provision respecting revocation of the appointment of pleaders Henceforth the leave of the Court will be required and it seems to be intended that no Court should grant such leave until the pleader whose power is to be revoked has been fully paid for the services already done by him

The reader will find ample information regarding this section in the paper headed "THE LEGAL PRACTITIONER" in Vol II of the Legal Companion, i e, in the January No of 1871

40. Processes served on the pleader of any party or left at the office or ordinary residence of such pleader, relative to a suit or appeal, and whether the same be for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes in relation to the suit or appeal as if the same had been given to or served on the party in person.

Service of process on pleader

Note

Corresponds with s 18 of Act VIII of 1859

This section has an additional provision for service on pleaders of processes relative to appeals

41 Besides the recognized agents described in section 37, any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

Agent to receive process

Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument, or, if the appointment be general, a duly attested copy thereof, shall be filed in Court.

His appointment to be in writing and to be filed in Court.

Note.

Corresponds with ss 50 and 51 of Act VIII of 1859

Henceforth attested copies of general appointment of agents to receive processes must be filed in Court

PRIVY COUNCIL.

The 30th June, 1st and 4th July and 25th November, 1876.

PRESENT:

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from Calcutta High Court.

RAM COOMAR COONDOO* and another (Plaintiffs) *Appellants,*

versus

CHUNDER CANTO MOOKERJEE (Defendant) *Respondent.*

Champerty and Maintenance—Agreement to share the Subject of Litigation, when against Public Policy—Non-liability of Stranger to the Record for Costs of Suit, in the absence of Malice and Want of Probable Cause.

The Respondent, as attorney and mooktear of *M.* and his wife, managed actions of ejectment and mense profits against the Appellants, advanced moneys for that purpose, and for the subsistence of his clients, having stipulated that he should be repaid all advances with interest at 12 per cent, and should have a third part of "the clear net profits" of the suit, with a right to possession of the land recovered as security therefor. He was neither an original nor an added party to the said suits, which, on appeal, were decreed in favour of *M.* and his wife by the High Court, but were afterwards dismissed by the Privy Council with costs, which *M.* and his wife were utterly unable to pay. Pending that appeal, the Respondent purchased the property in suit, and thereafter conducted the appeal in his own interest.

In an action by the Appellants against the Respondent to recover the amount of the said costs, it was averred, but not proved, that the actions were brought or instigated by the Respondent maliciously and without probable cause; and, failing such proof, it was contended, (1), that the agreement and acts of the Respondent amounted to champerty, or were otherwise illegal as being against public policy, and that the Appellants had suffered special damage from them; (2), that the Respondent was the real actor therein, and had an interest in them, and was, therefore, responsible for the costs:—

Held, that the English laws of maintenance and champerty are not of force as specific laws in *India.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid.

Whatever the rights of the parties to this agreement, it does not constitute a punishable offence, and cannot give to the Appellants, who were strangers to it, a right of action against the Respondent.

Such agreement created no legal privity between the Appellants and the Respondent from which a promise can be implied on the part of the Appellants to pay the Respondent his costs of the former action, on which an action of contract can be founded; nor does it

* *Vide* 4, Law Reports, Indian Appeals, p, 23.

establish a legal wrong, for the former action was brought without improper motives, and upon reasonable cause.

An action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of propable cause.

SIR MONTAGUE E. SMITH:—This suit was instituted by the Appellants, who were the successful Defendants in two former suits brought by one *McQueen* and his wife against them, to recover from the Defendant, *Chunder Canto Mookerjee,* who was neither an original nor added party in those suits, the amount of the costs incurred by them in that litigation, and which *McQueen* and his wife, by reason of their property, were unable to pay.

The principal suit of the *Mc Queens* (the other being for mesne profits only) was brought in the *Hooghly* Court to recover from the present Plaintiffs some lands in *Hooghly*, which their father had purchased of one *Bebee Bunnoo.*

Mrs. *McQueen* was the illegitimate daughter of one *McDonald* and *Bebee Bunnoo,* and she claimed the property as her father's, and as being entitled to it, after her mother's death, under his will. The defence of the now Plaintiffs in that suit was that *Bebee Bunnoo* was either the real owner, or had been allowed by *McDonald* to deal with the property as owner, and that their father was a purchaser from her without notice of any other title. It appears that they and their father had held possession of the property for twenty-four years after the purchase, and had greatly improved it.

The Principal Sudder Ameen held the suit to be barred by limitation, and dismissed it. The High Court (finding that *Bebee Bunnoo* had died within twelve years of the suit) reversed his judgment, and having retained the case, and tried it on the merits, passed a decree in favour of the then Plaintiffs, the *McQueens.*

On an appeal to Her Majesty, the decree of the High Court was reversed, and it was ordered that the suits should be dismissed, and that the then Defendants (the now Plaintiffs) should have their costs in *India,* and of their appeal to Her Majesty.

These costs amounted to a large sum, and the *McQueens* were unable to pay them.

The connection of the Defendant *Mookerjee* with the above litigation, and the facts relied on to support the present action, will now be referred to.

A special agreement was entered into between the *McQueens* and *Mookerjee,* which recited an apparently good title of the former to the property. By this agreement *Mookerjee* was appointed the attorney and mooktear of the *McQueens* to conduct the litigation against the present Plaintiffs. On the one side he undertook to manage the suit, to make all necessary advances for the purpose, and further to make an allowance of Rs. 150 per mensem to the *McQueens* for their support during the pendency of the proceedings. On the other side they agreed in effect that *Mookerjee* should have the management of the suit, they however assisting him, unless it happened that *McQueen* could give his whole attention to the litigation, in which case he was to have the conduct of it, " but under the control of *Mookerjee.*"

It was stipulated that all the advances should be repaid with interest at 12 per cent., and that, as remuneration for his trouble and risk, *Mookerjee* should have a third part of " the clear net profits" of the suit; and, by way of security, it was agreed that he should receive all moneys, and take possession of all lands recovered, and after satisfying his own claims pay over the balance to the *McQueens.*

This power of attorney was made irrevocable, unless upon the terms that the *McQueens* should repay all the moneys advanced with interest at 12 per cent., and a further sum of Rs. 2,000 as liquidated damages.

McQueen certainly did not give his whole attention to the suits; and (although he occasionally saw the pleaders) they were really managed by *Mookerjee.*

It appears that after the present Plaintiffs had obtained leave to appeal from the judgment of the High Court in the original suit, the *McQueens* obtained possession of the property. The Court having ordered the possession to be restored, unless the *McQueens* gave security to the amount of Rs. 12,000 to repay what would be due in case the decree should be reversed, the present Defendant gave a bond to the above amount as such security.

Pending the appeal to Her Majesty, *Mookerjee* purchased of the *McQueens* all their interest in the principal suit, and the suit for mesne profits, for Rs. 22,000, out of which he was to deduct Rs. 12,000 for the advances he had made to them, and from this time he appears to have conducted the appeal in his own interest.

It should be stated that in the former suit the now Plaintiffs—upon the agreement between *Mookerjee* and the *McQueens* coming to their

knowledge—applied to the Judge to have *Mookerjee* made a party to the suit under the 73rd clause of Act VIII. of 1859, in order that, if successful, they might make him responsible for costs. The Judge refused the application. Upon the appeal to the High Court by the *McQueens*, the present Plaintiffs raised this point in their memorandum of cross-appeal, but no notice appears to have been taken of it in the judgment of that Court.

The plaint in the present action alleges that the Plaintiffs being in lawful possession as owners of the property in question, the Defendant, knowing this was so, maliciously conspired with the *McQueens* to bring a suit in their names to take the possession from him, and in furtherance of this conspiracy entered into the agreement already described, which is set out at length. It then alleges that the agreement contains false and fraudulent recitals of a pretended title in the *McQueens*, and that it "savours of champerty and maintenance, and is otherwise wholly illegal and contrary to public policy," and was entered into "for the purpose of barratrously maintaining an unjust and oppressive suit against the Plaintiffs," in the names of persons who had no right, and were without means to pay the costs. It then avers that the former suit was brought "maliciously and without reasonable and probable cause," and after describing the proceedings in the suit, and the facts shewing the Defendant's connection with them, alleges that "the litigation was instigated and carried on by the Defendant at his own expense, and with a view to his own benefit, and that he was the real mover, and unlawfully used the procedure of the Court for his own benefit."

If all these allegations in the plaint, or so many of them as aver that the suit was brought or instigated by the Defendant, maliciously and without probable cause, had been proved, this action would undoubtedly have been sustained, upon the principle that the prosecution of legal proceedings which are instigated by malice, and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them.

This principle is thus stated by Mr. Justice *Williams* in *Cotterill* v. *Jones* (1) :—

"It is clear no action will lie for improperly putting the law in motion in the name of a third person, unless it is alleged and proved that it is done maliciously and without reasonable or probable cause;

(1) 11, C. B., 735.

but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

In the present case, however, both the Courts below have found that neither malice nor the absence of probable cause have been proved. Their Lordships entirely agree with the Court in *India* on this point, and it appears to them that the facts present a case having a wholly different aspect.

With regard to the motives of the Defendant it is not pretended that he entertained any ill-feeling or malice in any sense towards the Plaintiffs. The terms of the agreement, and his large expenditure, shew that he was prompted in what he did by his having formed a favourable and sanguine opinion of the title of the *McQueens*, and by the hope of a profitable return for his advances. Nor can the suit be said to have been wanting in probable cause, when the two learned Judges of the High Court who heard it on appeal decided in favour of the then Plaintiffs. Indeed, it was properly admitted at their Lordships' Bar that the case must be considered as if the allegations of malice and want of probable cause were struck out of the plaint.

These allegations being eliminated, the question is whether the action can be maintained upon either of the two grounds argued at the Bar, which, stating them generally, are :—

1. That the agreement and acts of the Defendant amounted to champerty, or were otherwise illegal as being against public policy, and that the Plaintiffs have suffered special damage from them.

2. That the Defendant was the real actor in the former suits and had an interest in them, and was, therefore, responsible for the costs of them.

The question whether the law of maintenance and champerty, or any rules analogous to that law, as it exists in *England,* have been introduced into and form part of the law of *India,* has been for a long period in controversy in the Indian Courts. A beadroll of decisions from 1825 to the present time was cited at the Bar, and it certainly appears from them that the views of the Courts have not been uniform, and that great diversity of opinion has prevailed.

The earliest case referred to occurred in the year 1825. A pauper Plaintiff, in his petition of appeal to the Sudder Court, disclosed the fact that he had agreed to give half the estate in litigation to a third person in consideration of advances made to prosecute the appeal. The

Court, after directing a search in the records for precedents of such a transaction, and none having been found, declared that "the transaction savoured strongly of gambling," and also that the contract to give half of a large estate for a comparatively small advance was "by no means fair," and ordered that unless the agreement was cancelled the appeal should not be entertained. (*Ram Gholam Sing* v. *Keerut Sing* (1)).

In 1836 the Sudder Court refused to enforce against a successful litigant an agreement he had made to give two annas of the estate if recovered in consideration of advances made to carry on the suit. They held first, that the estate being family property could not be thus disposed of; but they also held on the authority of the decision in 1825 that the transaction was of an illegal character as a species of gambling, and could not be sanctioned in a Court of Justice. (*Brijnerain Sing* v. *Teknerain Sing* (2)).

In 1840 a similar agreement to that in the last case came before the Court: one Judge thought it was not proved; but the other, Mr. *Tucker*, held, following the two former decisions, that "the agreement was illegal, thus (as he said) establishing the point for future guidance in all similar cases." (*Zuhooroonissa Khanum* v. *Russick Lal Mitter* (3)).

In a short note of a similar case in 1849, the Court is reported to have said: "As the precedents of the Court have held that champerty is illegal, we cannot enforce any condition (of the kind) in favour of the Plaintiffs." (*Andrews* v. *Maharajah Sreesh Chunder Raee* (4)).

In the next case the current of opinion underwent a marked change.

In 1852 a case was brought before a full Sudder Court consisting of five Judges, in which the Principal Sudder Ameen had dismissed a suit because the Plaintiff had obtained the funds to prosecute it by means of an agreement which he deemed to be champertous. This decision of the Principal Sudder Ameen was, in any view of the law, erroneous; but the Judges took occasion to express their opinion on the general question. Sir *R. Barlow* says: "There is no distinct law in our Code which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the Plaintiffs." Mr. *Welby Jackson*, whilst he thought

(1) 4, Select Reports, 12.
(2) 6, Select Reports, 131.
(3) 6, Select Reports, 298.
(4) S. D. A., 1849, Beng., 340.

the precedents of the Court (referring to the cases already mentioned) had held champerty to be illegal, says: "But the matter having been now brought up generally for consideration before the whole Court, I have no hesitation in declaring my opinion that an arrangement of the nature of champerty is not of itself illegal or void." Again he says: "I know of no law against such an arrangement, and there is certainly no reason why it should be declared illegal. Such arrangements must stand or fall according to the peculiar nature of their conditions. They are liable to question like any others where a suit is brought to enforce or avoid them." The other three Judges construe the former precedents (with one exception) as holding only "that as between a Plaintiff and a party advancing funds to him to carry on his case, the Courts will not recognise and enforce agreements which appear to be exorbitant and to partake of the nature of gambling contracts." (*Kishen Lal Bhoomick* v. *Pearee Soondree* (1)).

This case appears to have been generally regarded as a leading decision. Mr. Justice *Glover* so treats it in a case which came before the High Court so late as 1868, and refers to it as deciding that champerty *per se* was not illegal: *Panchcouree Mahtoon* v. *Kalee Churn* (2). In this same case, however, Mr. Justice *Macpherson* said he did not feel it necessary to decide the question; and in consequence of the opinions expressed by him and other learned Judges in *India* in recent cases it will be necessary to advert shortly to some of the subsequent decisions.

In *Grose and Another* v. *Amirtamayi Dasi* (3), which was the case of a contract of a champertous character made by a Hindu widow, Mr. Justice *Phear*, after a full review of the English and Indian cases, expressed an opinion that the law which renders champerty and maintenance illegal in *England* is in force at least within the Presidency towns; and further that agreements of that character were against the interests of society in *India*, and therefore, on grounds of public policy, void. Upon an appeal to the full Court, the Chief Justice (Sir *Barnes Peacock*) did not adopt this ground of decision. He expressed his opinion thus:—"That the deed was not binding on the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative, if not gambling contract."

(1) S. D. A., 1852, Beng., 394. (2) 9, Suth. W. R., 490.

(3) 4, Beng. L. R., 1.

Mr. Justice *Macpherson* agreed with Mr. Justice *Phear* in thinking that the agreement was void, as being against public policy.

Mr. Justice *Holloway* in a case which came before the High Court of *Madras* in its original jurisdiction in 1870, expressed a strong opinion that the English statute and common law relating to champerty and maintenance prevailed in that Court, and rendered contracts bearing that character void. He also, with some vehemence of language, denounced such contracts as being contrary to public policy. The opinion expressed by Mr. Justice *Holloway* on the application of the English statute and common law was not necessary to the decision of the case, for the agreement sued upon was clearly extortionate, and there were other sufficient grounds for the refusal of the Court to enforce it. (*Mulla Jeffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (1)).

This opinion of Mr. Justice *Holloway* seems to be directly opposed to the view expressed by Chief Justice *Scotland* in delivering the opinion of the High Court of *Madras* in a former case (*Pitchakutti Chetti* v. *Kamala Nayakkan* (2)). The Chief Justice there says:—" Maintenance and champerty are made offences by the common and statute law of *England*, which in this respect has no application to the natives of this country, and in considering and deciding upon the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice upon which the law at present rests. To this extent we think the law can properly be applied in perfect consistency with the Hindu law relating to contracts. (See 1, *Strange's* Hindu Law, p. 275.)"

The passage in *Strange* alluded to by the Chief Justice descants upon the similarity between English and Hindu law with regard to the invalidity of contracts which violate public policy and the interests of the community.

In a late case in the High Court of *Bombay*, *Damodhar Madhavji* v. *Kahandas Narandas* (3), *Westropp*, C. J., declined to express any opinion as to the extent to which the law of champerty is applicable to the Presidency towns or in the Mofussil.

To return to the *Bengal* Presidency, it will be necessary to refer to one more decision only before coming to the judgments in the present suit. In the case of *Tara Soonduree Chowdhrain* v. *The Court of Wards* (4), the Court (Sir *R. Couch* being Chief Justice) held that the agreement

(1) 7, Mad. H. C. R., 128.
(2) 1, Mad. H. C. R., 153.
(3) 8, Bom. H. C. Rep. O. J., 1.
(4) 20, W. R., 446.



it was sought to enforce was void, "as being contrary to public policy, and as therefore not giving any right to sue for the property which was professed to be passed by it." The learned Chief Justice commented upon and adopted the observations of this tribunal in the case of *Fischer* v. *Kamala Naicker* (1). He also referred with approval to the remarks of Mr. Justice *Holloway* as to the mischievous effects of such agreements in *India*.

It is to be observed that in none of the above cases did any question arise as to the liability of the parties who entered into the agreements to third persons.

To come to the judgments in the present suit. Mr. Justice *Macpherson* was of opinion upon the point now under consideration that the agreement was illegal and void as being against public policy, and he held, on the authority of the English case of *Pechell* v. *Watson* (2), that the present suit might be maintained.

In the judgment of the High Court delivered by Sir *R. Couch*, C. J., reversing Mr. Justice *Macpherson's* decree, the Chief Justice says: "It has been always admitted that the English Common Law and the statutes as to maintenance and champerty are not applicable, and are considered as having no force in this country. They certainly do not apply to the Mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is that they are contrary to public policy; or, as described by the Judicial Committee of the Privy Council (referring to the case in 8 *Moore*), are considered to be immoral and against public policy and such as the law will not enforce here, and treat as void." And he held that, though such agreements were in a sense illegal, they did not amount to "an offence in *India* so as to give a right of action to a person who might sustain special damage from it, even if such an action might now be maintained against a person committing the offence of champerty in *England*."

It will now be convenient to refer to two cases before this Committee in which the subject has been to some extent considered. In the case reported in the 8th *Moore*, the Court below having held an agreement to be void for champerty, this tribunal thought the judgment to be

(1) 8, Moo. Ind. Ap. Ca., 170. (2) 8, M. & W., 691.

wrong on the grounds that the point had not been raised by the pleadings, and also that the agreement was in no sense champertous, and this being so, their Lordships observed : " It was unnecessary to decide whether under the law which the Court was administering those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the common law and partly by statute, are forbidden." But in the course of the judgment they made the following observations : " The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were inquiring was something which must have the qualities attributed to champerty or maintenance by English law ; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive is in the same sense necessary."

It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in *England;* but they have been properly regarded in *India* as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

In the more recent case before this tribunal, *Chedambara Chetty* v. *Renga Krishna Muttu Vira Puchaiya Naickar* (1), in which a suit to enforce an unrighteous an champertous bond was dismissed, the following observations were made :—

" With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in *India* is not the same as it is in *England.* The statute of champerty being part of the statute law of *England,* has of course no effect in the Mofussil of *India* ; and the Courts of *India* do admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the Courts of *England.* On the other hand the cases cited shew that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir *Barnes Peacock* in the course of the argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bond*

(1) Law Rep., 1, Ind. Ap., 241.

fide entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation disturbing the peace of families and carried on from a corrupt and improper motive."

The result of the authorities, then, appears to be that the English laws of maintenance and champerty are not of force as specific laws in *India ;* and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the Mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly been whether they are in force in the Presidency towns, although the distinction between the Presidency towns and the Mofussil has not been always borne in mind.

It is to be observed that the English statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the common law also, it was an offence for these and other persons to act in this manner. Before the acquisition of *India* by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on, without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in *England* in early times, and had fallen into, at least, comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of *India*, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. The principles on which the exclusion from *India* of special English laws rest are explained in the well-known judgment of *The Mayor of Lyons* v. *The East India Company* (1). It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the Defendant, furnish reasons for holding that these special laws are inapplicable to these towns. There seems to have been always, to say the least, great doubt whether they were in

(1) 1, Moore's Ind. Ap. Ca., 176.

force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

It would be most undesirable that a difference should exist between the law of the towns and the Mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the Mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

But whilst their Lordships hold that the specific English law of maintenance and champerty has not been introduced into *India*, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought n ot to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believe to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,— effect ought not to be given to them.

Such, then, being the law on this subject in *India*, it fails to support the present action. It may be that the contract in this case is unconscionable, and one which ought not to have been enforced against the *McQueens* if their suit have been successful; but assuming this to be so, the Plaintiffs, in their Lordships' view, have failed to establish that an action arises to them therefrom against the Defendant for the losses and costs of the litigation. By the law of *India*, as above interpreted, the

agreement did not constitute a punishable offence, and the action cannot therefore, as pointed out by the Chief Justice below, be sustained on the ground that where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved, nor does there appear to be any other principle upon which the action, under the circumstances of the present case, can be maintained. Whatever, therefore, may be the rights of the parties to the agreement as between themselves, their Lordships think that the High Court was right in holding that the action of the Plaintiffs against a third party, founded on the alleged champerty, cannot be maintained.

There remains the question whether the action can be supported against the Defendant, as being an actor in the suit, and having an interest in it. It is to be observed that a suit of this kind, in the absence of malice, and of the want of probable cause, is of the first impression, no precedent for it having been found either in *England* or *India*. It may be assumed that, under the first agreement, the Defendant acquired a contingent interest in the property the subject of the suit to the extent of one-third share, besides the security for his advances; that he agreed to supply all the funds required to carry on the litigation, and that he obtained the virtual control of the proceedings; for although, under certain circumstances, *McQueen* was to manage the suit, and in any case to assist in the management, the supreme control was to belong to the Defendant, subject to a power of revocation by the *McQueens* on onerous terms, which was not exercised. But this state of things created no legal privity between the Plaintiffs and the Defendant, from which a promise can be implied on the part of the Defendant to pay the present Plaintiffs the costs of the former suit, on which an action of contract can be founded; nor does it establish a legal wrong, for the former suit, as already shewn, was brought without improper motives, and upon reasonable cause. It has, however, been contended that it would be only in accordance with justice and equity that he who was the principal mover of a suit, and had an interest in it, should be made liable to the costs. It is obvious that a wide field of new litigation would be opened if, after the termination of the original suit, another independent suit might, on such general grounds, be brought against third persons. Interminable questions would arise as to the degree of meddling and assistance which would create the liability. So far as precedents exist, it is either in the original suit itself, or by the exercise

of the summary jurisdiction of the Courts, that any such liability has been enforced. It is ordinary practice, if the Plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given. The now Plaintiffs were fully aware, during the pendency of the former suit, of the arrangement between the *McQueens* and the Defendant, but instead of applying for security for costs, they petitioned the Court to make him a co-Plaintiff under the 73rd section of Act VIII. Without deciding whether this application was rightly rejected, it is enough to say that its rejection cannot give ground for an action which would not otherwise lie.

The instances in which persons other than parties to the suit have been held liable to costs in *England*, have been principally those of solicitors, over whom the Court exercises disciplinary jurisdiction, as in the case of *In re Jones* (1). The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings: see *Hayward* v. *Gifford* (2). But all these cases relate to applications either in the cause itself, or to the summary jurisdiction of the Court.

A case in the High Court in *Calcutta* was much relied on by the Appellant's counsel: *Bamasoonduree Dossee* v. *Anundolal Bose* (3). There in a suit brought (in the original jurisdiction) to recover possession of land by a nominal Plaintiff, Mr. Justice *Phear*, on a motion, made apparently in the suit, ordered the real Plaintiffs to pay the costs. His judgment is placed mainly on the ground that the jurisdiction exercised by the English Courts in actions of ejectment was introduced into the original jurisdiction of the High Court, and was applicable to analogous actions brought to recover land there. The Chief Justice (Sir *Barnes Peacock*) in affirming this order on appeal, supported it not only on the ground on which Mr. Justice *Phear's* judgment rests, but on the circumstances of the case, which shewed, as he thought, that there had been "a gross abuse of the powers of the Court, and a contempt of Court."

It is obvious that there is nothing in these judgments which gives

(1) Law Rep. 6 Ch. 497. (2) 4, M. & W., 194.

(3) Bourke's Rep. O. C. J., 45; and on appeal, p. 96.

support to the contention that an independent action will under such circumstances lie.

It was lastly insisted for the Plaintiffs that if the costs in *India* were not recoverable, the action ought to be sustained for those incurred in the appeal to Her Majesty, subsequently to the purchase made by the Defendant, pending that appeal, of all the rights of the *McQueens* in the property and the suit. Undoubtedly the *McQueens* after this purchase became nominal Appellants only, and the claim of the Plaintiffs to recover these latter costs is as strong as a case of the kind can be. But even so, it is not stronger than many cases of ordinary occurrence, as, for instance, trustees suing on behalf of those beneficially interested, or the assignors of choses in action on behalf of their assignees; and in these and similar cases which have long been familiar to the Courts, whilst modes, such as requiring security for costs, have been devised for reaching the real party, no independent action for the costs against a stranger to the record has ever been sanctioned. Their Lordships, therefore, think that no distinction can properly be made between the costs of the appeal and the rest of the costs.

It results from what has been stated, that by English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in the suit, in the absence of malice and want of probable cause. Consequently, if that law governs, the second ground on which it is sought to support the present action fails. And if the law administered in the Mofussil is to be resorted to, the absence of all precedent in a case of such common occurrence affords an irresistible presumption that no such action is maintainable there. In answer to the suggestion that if no precedent exists, it should now be made, it has been already pointed out that where there is neither privity of some kind nor a wrong, the principle upon which actions are ordinarily sustained is wanting. When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases "for which no specific rules may exist." Now, it appears to their Lordships to result from what has been already observed, that rules may properly be considered to exist which define the character of actions of this kind, and the circumstances under which alone they can be brought, and that it would be out of place to resort to these general principles in dealing with

such actions. The consequences of such a resort in cases of this character would be to make the law utterly uncertain, to raise, as before observed, interminable questions as to the degree of interference which would sustain the action, and mischievously to multiply and perpetuate litigation after the termination of the original suit. Their Lordships, therefore, feel constrained to hold that in the absence of circumstances to convert the prosecution of the former suit into a wrong, the present action cannot be maintained.

It has been a misfortune to the Plaintiffs that security was not obtained for the costs in the course of the former suit. Their Lordships also think the Defendant was to blame in not coming forward as the real party in the former appeal. Under these circumstances, whilst they must humbly advise Her Majesty to affim the judgment appealed from, they will make no order as to costs.

CALCUTTA HIGH COURT.

The 4th September, 1876.

FULL BENCH.

PRESENT :

Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Macpherson, and Mr. Justice Markby.

RAJENDRONATH MOOKHOPADHYA* (one of the Defendants)

versus

BASSIDER RUHMAN KHONDKHAR and another (Plaintiffs).

Landlord and Tenant—Notice to quit—Suit for Ejectment—Procedure.

A ryot whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has received no such notice.

This case was referred to a Full Bench in the following order of reference (in which the facts sufficiently appear) by

MARKBY, J.—The facts of this case may be very shortly stated. The plaintiff was a cultivating ryot, not having (as far as appears) any right of occupancy and not holding for any specified term. In Jeyt, 1279, (13th May to 13th June, 1872), his landlord, without giving him any notice at all, put in a fresh tenant. In Pous, 1279, (14th December, 1872, to

* *Vide* I. L. R., 2, Calcutta Series, p. 146.

12th January 1873), the plaintiff brought this suit to recover possession. The zemindar, who together with the in-coming tenant, defended the suit, alleged that the plaintiff had relinquished his tenure in 1276 (1869—1870). Both Courts have found that there was no relinquishment, and have given the plaintiff a decree.

In special appeal it is contended that the plaintiff had no title upon which he could recover possession. Of course, as against any one but his own landlord, it is clear that the plaintiff had a title to recover possession; and even as against his own landlord, I should have thought that the plaintiff could have recovered possession. It is I think clear upon the authorities that he could not have been ejected without reasonable notice, and then only at the end of the year—*Bakranath Mandal* v. *Binodram Sen* (1) and *Janoo Mundur* v. *Brijo Singh* (2). And unless his tenancy has been put an end to by this present litigation, it is still subsisting.

This last point is the one upon which the doubt arises in consequence of a decision in *Hem Chunder Ghose* v. *Radha Pershad Paleet* (3). There the learned Judges, whilst recognizing the right of the tenant to a reasonable notice to quit, expiring at the end of the year, seems nevertheless to consider that the institution of a suit is itself a sufficient demand of possession for the purpose of maintaining the suit, and that the tenant's claim for a reasonable notice, expiring at the end of the year, will be satisfied by fixing such a date for giving up possession as will be fair towards himself.

If that be so, I do not think the plaintiff in the present case could recover possession; he would only be entitled to some compensation for having been ejected too soon.

But with very great deference, I cannot bring myself to think that the decision I have referred to is correct. I do not see how the landlord, who has not determined the tenancy by a proper notice, can recover in ejectment. Even in the case of a tenancy-at-will, it is necessary under English law that the will should be determined—*Doe d. Jacobs* v. *Philips* (4), where it was argued that the will was determined by bringing the action, but the Court held that it was not so. The case of a ryot whose tenancy can only be determined at the end of the year by a reasonable notice to quit is a much stronger one.

(1) 1, B. L. R., F. B., 25.
(2) 22, W. R., 548.
(3) 23, W. R, 440.
(4) 10, Q. B., 130.

It seems to me impossible to consider such a ryot otherwise than as a tenant from year to year. I do not say that the incidents of the tenancy are precisely the same as those of a yearly tenancy in England. But I cannot think that the ryot can be ejected without a proper notice to quit.

The case of *Hem Chunder Ghose* v. *Radha Pershad Paleet* (1) is based upon the decision in *Mahomed Rasid Khan Chowdry* v. *Jadoo Mirdha* (2); but I am strongly disposed to think that the learned Judges did not there intend to lay down any proposition of law at all; I think that decision only carries out a suggestion made by the Court for the benefit of the parties and in order to avoid further litigation.

The question being one of great importance, I feel myself justified in referring to the Full Bench the question whether a ryot, whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit brought against him by his landlord dismissed on the ground that he has had no such notice, or whether in such a case the Court ought to give a decree in favor of the landlord, fixing a date for giving up possession, which shall be fair towards the tenant.

The opinion of the Full Bench was delivered by

GARTH, C. J.—We are of opinion that, in the case of a ryot of the clsss specified in the question referred to us,—*i. e.*, a ryot whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year,—the ryot can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has had no such notice.

BOMBAY HIGH COURT.

The 28th November, 1876.

PRESENT:

Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

PRANSHANKAR SHIVSHANKAR* (Defendant) *Appellant,*

vs.

GOVINDHLAL PARBHUDAS, (Plaintiff) *Respondent.*

Action for damages caused by a civil action—Costs.

No action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause; nor will it lie to recover costs awarded by a Civil Court.

(1) 23, W. R., 440. (2) 20, W. R., 401.

* *Vide* I. L. R., 1, Bom. Series, p. 467.

The following case was submitted for the opinion of the High Court by Gopalrao Hari Deshmukh, Judge of the Court of Small Causes at Ahmedabad :—

" The plaintiff Pranshankar obtained a decree against one Govind Khusab, in the Subordinate Judge's Court, and got two houses attached on the 20th July 1872. Govind Purbhudas, defendant in the present suit, applied to the Court under Section 246 of the Code of Civil Procedure, on the 1st August 1872, for removal of the attachment laid on the houses, alleging that they were purchased by him. The objection was allowed by the Subordinate Judge, who ordered the attachment to be removed. Whereupon the plaintiff instituted a regular suit against the defendant which was decided in favour of the latter. Against this decision the plaintiff appealed to the Assistant Judge's Court, which decided on the 26th August 1874 that the purchase-deed was fraudulent, and that the objection to the sale be disallowed. Consequently the plaintiff recovered the amount decreed, not by sale of the houses, but by cash payment of Rs. 600. The plaintiff now seeks in this Court to recover interest at 9 per cent. per annum, from 20th July 1872 to 25th October 1875, during which period he was prevented from executing his decree by the defendant, and the amount of costs that was paid by him to the defendant, as awarded by the Subordinate Judge in the miscellaneous application for removing the attachment. The question is whether a suit for such damages can be maintained.

PER CURIAM :—The Court is of opinion that the suit will not lie. An action is not maintainable for damages occasioned by a civil action, even though brought maliciously, and without reasonable and probable cause (*see* Addison on Wrongs, p. 599, 3rd edition); neither will a suit lie to recover costs awarded by a Civil Court, though it may lie for costs which could not be so awarded : *Chengulva Raya Mudali* v. *Thangatchi Ammal* (1).

(1) 6, Mad. H. C. Rep., 192.

THE LEGAL GUIDE.

We have on our table a series of pamphlets, entitled "The Legal Guide," edited by Baboo Kumud Nath Dutt, Sheristadar of the Board of Revenue, Calcutta. The author intends to publish abstracts from the Regulations and Acts that are in force in Bengal and assures his readers "that no pains will be spared to make these abstracts as complete and simple as possible and that everything which they may consider important to them will be noticed" in his work, which is "published bi-monthly in dig-lot forms in the easiest style" both in the English and Bengali languages. The price of the work is Rs. 5-8 per year. Every issue contains 2 forms or 16 pages (royal octavo). We have carefully gone through all the numbers that have been published and are undoubtedly of opinion that this work will not only facilitate the study of Indian Statutes, but will, when completed, be a Compendium of very valuable legal information, capable of being used for reference or practical purposes with the greatest readiness and ease. It is written in the simplest style. We believe that this work will do immense good especially to the people of Bengal. The following extracts will show whether we are justified in making the above remarks or not.

*Acquisition of Land for Public Purposes.**

(Act X. of 1870.)

Act X. of 1870, which repealed all other Acts on the subject, was passed by government in order to legalize and facilitate proceedings in connection with the acquisition of lands for its own purposes and those of any company or corporation. It extends to the whole of British India.

Acquisition, Secs. 4—17.

2. Whenever any land is required for a public purpose the Collector prepares an estimate of the value of the land and causes a public notice (which shall legalize the entering upon, and taking all necessary pro-

* Legal Guide, Part I. Chapter X. p. 125.

ceedings for marking out boundaries of, the land, provided that for entering into any building or any enclosed garden attached to a dwelling-house a seven days' notice must be given to the occupier, on the land, and another, to the proprietors or occupiers of such land, requiring them, to appear, personally or by agent, before him at a time not earlier than 15 days from the date of its publication and to give him a statement of the nature of their respective interests in, and rents and profits arising from, it ; and such persons are legally bound to do so, under sections 175 and 176 of the Indian Penal Code (4 and 5). In making the necessary enquiries for determining the amount of compensation, the Collector has power of the Civil Court in enforcing the attendance of witnesses and compelling the production of documents. If he and the persons interested, agree as to the amount of compensation, the Collector makes an award, which shall finally determine the matter; but if they do not, or if no claimants or persons interested attend on the fixed day, or if any dispute as to the right or interest in the land arise among the persons, the Collector refers the matter to the Civil Court in the following manner. (11—15.) In cases of urgency, the Collector may take possession of the land, even if there be no award, or reference made to the Court, and adjust the matter thereafter (16-17).

Reference to Civil Court, Secs. 18—35.

3. On a reference being made to it, the Court shall proceed to serve notices on the persons interested and the Collector, requiring them to appoint two qualified assessors, respectively, to aid it in determining the amount of compensation; and in case of failure to nominate either of such assessors the Judge himself appoints one. (18—22). In determining the amount of compensation in an open court, the Judge or assessors shall stick themselves to the following points (a) the market price of the land in question—(b) the damage sustained by the person, injuriously affecting his other property in any other manner—or his earning ,—(c) the reasonable expense for removing his residence. And they shall leave out of consideration the following—(a) degree of urgency which led to the acquisition—(b) any increase in the value of the land, thereafter, as of any other land of the person likely to accrue from the use of the land acquired; (c) any improvement made on the land, with the intention of increasing the amount of compensation. The amount of compensation shall not exceed the Collector's offer, if the person refuses to make any claim, without sufficient reason, but if he does so with sufficient reason,

it may exceed, the amount tendered by the Collector at the time of reference (23—26) and if the Judge and one of the assessors agree, their decision is final: but if the Judge and the assessors differ upon any point of law or usage, having the force of law, or as to the amount of compensation, the opinion of the Judge shall prevail but in the latter case, an appeal may lie to an authority immediately above him like regular appeals under the Code of Civil Procedure. An assessor not being a Government officer, is entitled to a fee not exceeding 500 rupees; (28—31). The whole cost of the proceedings shall be taken from the persons interested, if the amount, so decided, does not exceed that in the Collector's tender; but if it does, the Collector should pay the whole. (32—35).

Apportionment of compensation, Secs. 37—39.

4. Apportionment of compensation should be made by the Collector, with the consent of all persons interested in the land; but if any dispute arise between them respecting it, he shall refer the matter for the decision of the Court, which again is appealable to an authority immediately above it, like regular appeals under the Code of Civil Procedure (37—39).

Payment, Secs. 40—42.

5. The Collector is to pay 15 per-cent. on the market price in addition to the amount of compensation awarded, and then take possession of the land, which however may remain with the proprietors, until it is required. If compensation and the said percentage be not paid, on taking possession, he is to pay them the amount with interest at the rate of 6 per-cent. per annum but the shall deduct, from the amount, the costs (if any) in the proceedings, and shall not pay the amount until the time for appeal is over or if it is preferred, until it is disposed of.

Temporary occupation, Secs. 43—45.

6. If the land is to be occupied for a limited time, the term for such occupation shall not exceed 3 years. The Collector, as directed by the Local Government, shall give notice to the persons interested in the land, and make an agreement with them, specifying the amount of compensation to be paid either at once, or by instalments, but if they differ as to the said amount, the case will be referred to the Court, (43). The agreement or the reference being made, the Collector may take possession of the land, and pay compensation for any damage caused in consequence. If the land be rendered permanently unfit to be used, the Local Government shall proceed to acquire it permanently in the

manner stated above (44). If the Collector and the persons interested differ as to the condition of the land after the term is over the case will be referred to the Judge, who, sitting alone, will finally decide the matter (45).

Acquisition of land for Co mpanies, Secs. 46—50.

7. The proceedings in acquiring any land for a Company are as follow.—If the Local Government, after inquiry through an authorized officer who is also empowered to enforce the attendance of witnesses and compel the production of documents, is satisfied that the land is needed for the intended work and that such work will prove beneficial to the public, it shall, after requiring the company to enter into an agreement with the Secretary of State for India in Council, and providing for all necessary matters, authorize any officer of the Company who shall be deemed as an officer of the Government to take proceedings under the Act. Every such agreement, after its execution, shall be published in the Gazette of India as well as in the Local Official Gazette. All subsequent proceedings are conducted under the general rules laid down in this Act. (46—50.

Miscellaneous, Sections 51—59.

8. Any notice under the Act, whether signed by the Collector or Judge or by the authorized officer shall be served on the person, by delivering a copy thereof either to the person himself or to any adult male member of his family, or by hanging it on the outer-door of his mansion (51). Whoever wilfully opposes any person in doing any thing necessary for making experiments, or does any inquiry into the trench or boundary is liable to imprisonment for any term not exceeding one month or to fine not exceeding 50 Rupees or to both (52). Part of a house or building is not to be taken when the owner desires that the whole shall be so acquired (55). No person is bound to pay stamp duty for an award or agreement made under this Act, or any fee for a copy of the same (57). No suit shall be brought to set aside an award under this Act; and no suit shall be instituted against any person for any thing done in pursuant to this Act, without giving him a month's previous notice; and the time of such an action is three months from the date of the cause of action (58).

*Land Improvement.**

(ACTS XXVI. OF 1871, XX. OF 1873, XVI. OF 1874 AND XXI. OF 1876.)

The Government may make advances for the improvement of lands used for agricultural purposes or waste lands which are culturable, on the applicant's furnishing good security.

Persons entitled to advances, Sections 6—13.

2. When the applicant is a landlord and the value of the property pledged is not less than the amount applied for, the Collector may grant a certificate sanctioning the advance. When the applicant is a tenant with transferable interest the landlord is served with a notice showing the particulars of the application and if no objection is preferred within a month after the service of the notice and if the value of the property pledged be not less than the amount claimed, the Collector may grant a certificate for the amount. The landlord must stand security for the tenant who fails to furnish a security as above.

Improvements, Section 1.

3. Advances are made only for the following purposes :

1st, Wells, tanks and other works for the storage, supply or distribution of water for agricultural purposes or the preparation of land for irrigation;

2nd, Works for the drainage of land; for the reclaiming of land from rivers or from other waters; for the protection of land from floods or from erosion or other damage by water;

3rd, The reclaiming, clearing or enclosing of lands for agricultural purposes;

4th, The renewal or reconstruction of any of the foregoing works, or alterations therein, or additions thereto.

Certificates, Section 14.

4. The certificate granted under this Act shall specify (*a*) the amount of the advance; (*b*) the conditions under which it is to be made and recovered; (*c*) the position, extent and boundaries of the land to be improved; and (*d*) the nature and amount of the security furnished, if any, other than the land to be improved.

Recovery of advances, Sections 15 and 16.

5. The advances, if not voluntarily repaid, are recoverable, with interest and costs if any, as arrears of revenue.

* Legal Guide, Chap. XI., p. 131.

6. The revised rules regulating the form of application, mode of enquiry &c. are important and are quoted below—

Rules, Section 18.

Advances under these rules may be made from such sums as the Governor-General in Council may from time to time allot to the local Government, or as may be otherwise at its disposal for the purpose of such advances.

2. Applications for advances under the Act shall be made in writing. They shall be presented to the Collector of the district, to the Assistant Collector in charge of the sub-division, or to the tehsildar in charge of the tehsil in which the land to be improved is situated. The personal attendance of the applicant is not necessary.

3. The application shall state—

(1) the name, caste, parentage, profession, and residence of the applicant;

(2) the amount of the advance applied for ;

(3) the nature and description of the work for which the advance is required ;

(4) the security offered for the repayment of the advance.

In the case of an application for an advance exceeding Rs. 1,000, the application shall further state—

(5) whether the applicant proposes to supplement the advance by any private capital, and if so, to what extent;

(6) the estimated total cost of the proposed work, and the probable period that will be occupied in its construction;

(7) the village and local revenue sub-division in which the land to be benefited is situated, the position, character, and area of such land, and should it consist, in part or wholly, of numbered and measured fields or plots, the numbers of the same ;

(8) the applicant's rights or interests in the land to be benefited and in any other land offered as security for repayment of the advance, and whether there are any, and if so, what, incumbrances on such rights or interests;

(9) the advantages expected to result from the work ;

(10) the manner and extent to which the proposed work will affect (favourably or injuriously) adjoining or other lands ;

(11) the amount and number of the instalments by which the advance is to be repaid, principal and interest, and the dates on which these instalments are to be paid.

4. When the application is for an advance not exceeding Rs. 1,000, the officer to whom it is presented shall ascertain, so far as may be possible from the oral statements of the applicant, or otherwise, the particulars numbered (5) to (11) above. These particulars shall be recorded on, or on a paper to be attached to, the application, and shall be signed by the officer, read over to the applicant, and acknowledged by him to be correct.

5. If the application be for a sum exceeding Rs. 1,000, and it be found to have omitted any of the particulars required by rule 3, the officer receiving it may either return it for correction, or, at his discretion proceed as required by rule 4 in the case of applications for sums not exceeding Rs. 1,000.

6. The statements under head (8) of the heads mentioned in rule 3, whether contained in the application or recorded under rule 5, shall at once be tested, as far as may be possible, by reference to such records bearing upon them as may be accessible to the officer to whom the application is made.

7. If the officer receiving the application be not authorized by the local Government under section 3 of the Land Improvement Act, to exercise the powers of a Collector under the Act, he shall forward the application to the Collector of the district, who shall either dispose of it himself or refer it to an authorized officer for disposal.

8. If the Collector or other such authorized officer as aforesaid (hereinafter called the "Collector") considers that there is *primâ facie* reason to believe that the application should be granted, he shall cause it to be entered in the register of applications and shall order a local inquiry to be made. If he is of opinion that the application should not be granted, he shall reject it.

9. There shall be a local inquiry in every case. It shall be conducted by such persons and according to such rules as the local Government may from time to time prescribe, and shall be directed to testing and verifying the statements required by rule 3 to be entered in the application, or by rule 4, to be recorded by the officer receiving the application.

If the officer receiving the application has been unable, in his examination of the applicant under rule 4, to obtain information under any of the headings (5) to (11) of rule 3, the omission shall be supplied by the person making the local inquiry.

10. When the work to be undertaken will cost more than Rs. 5,000 and is one requiring professional skill, the applicant shall be required to submit to the officer making the local enquiry an accurate plan, specification, and estimate. If the applicant is unable to furnish such a plan, estimate, or specification, the Collector may cause them to be prepared on behalf of the applicant, first requiring him to deposit such sum of money as may, in the opinion of the Collector, be sufficient to cover the cost, or, if he think fit, calling upon him to give security for the repayment of the same.

11. On the completion of the inquiry, the officer by whom it was made shall forward to the Collector the whole of the papers connected therewith, together with his own opinion and recommendation. If the Collector, on receipt of the papers, thinks further inquiry necessary, he may either make such inquiry himself or remand the case to the official who made the first inquiry, or transfer it to any other official authorized to conduct such inquiries, for the purpose of a further investigation being made.

12. If, on a review of the local inquiry, the Collector is satisfied that the advance may be properly made, or that a less sum than that asked for may properly be granted, he shall record a decision to that effect. On recording such decision, the Collector may, if the amount of the advance to be made does not exceed Rs. 1,000, at once grant a certificate for the advance under section 14 of the Act.

13. If the amount of the advance exceeds Rs. 1,000, the Collector shall report his decision to the Commissioner. If the advance does not exceed Rs. 2,500, it may be sanctioned by the Commissioner. If it exceeds that amount, it shall be reported to the Board of Revenue, who may grant it if it does not exceed Rs. 5,000. Advances of sums above Rs. 5,000 require the sanction of the local Government, and of sums above Rs. 10,000 that of the Government of India. The Collector, Commissioner, Board of Revenue, or local Government, may, on perusal of the records of the local inquiry, if they think that the advance should not be granted, refuse to grant it, or may order further inquiry, if they think fit to do so. On receipt of the orders of the authority competent to grant the advance, the Collector shall issue a certificate for the amount, if it be ordered to be granted.

14. When the Collector rejects the application for an advance, his decision shall be subject to appeal to the Commissioner, who may, if the

amount be within his competence to grant, disallow the rejection and direct the Collector to grant a certificate. If the amount be beyond his competence to grant, he shall report the case for the orders of the authority competent to grant it. Decisions by Commissioners rejecting applications shall similarly be open to appeal to the Board of Revenue, and those of the Board of Revenue to the local Government.

15. It shall be competent to the Commissioner, the Board of Revenue, or the local Government, to call for the record in any case, and to pass such orders thereon as may be within their competence respectively.

16. When the advance applied for does not exceed Rs. 1,000 no charge shall be made for serving such notices as it may be necessary to serve under sections 7 and 11 of the Act. When the advance applied for exceeds Rs. 1,000, but does not exceed Rs. 5,000, the serving of any notice which it may be necessary to serve shall be paid for by the applicant at a rate not exceeding half the rate required for the service of a notice by a revenue court in the district in which the land is situate. When the advance applied for exceeds Rs. 5,000, the rate shall be that fixed for serving a notice by a revenue court in the district in which the land is situate.

17. When a certificate is granted it shall be endorsed by the applicant to the effect that he has understood and agreed to all the terms, and it shall be signed by him in the presence of, and shall be attested by, two witnesses. If any property other than the property of the applicant is pledged or mortgaged as security for the repayment of the advance, the certificate shall be similarly endorsed, signed, and attested by the sureties and witnesses, and if the applicant is a tenant who cannot furnish security of the nature referred to in section 7 of the Act, the certificate shall be signed by his landlord and attested by two witnesses other than the landlord.

18. The certificate shall be retained in the office of the Collector; one copy shall be given to the applicant, and when advances are made payable at any tehsil or other subordinate district treasury, a copy of such certificate shall be sent to such treasury.

19. Except with the special sanction of the local Government, no advance of any sum not exceeding Rs. 500 shall be made unless it be repayable with interest within seven years from the date on which the advance is made, and no advance exceeding Rs. 500 shall be made with-

out such sanction unless it be repayable within 12 years from such date. If in any case the proposed period of repayment exceeds 20 years from such date, the sanction of the Government of India to the proposed advance must be obtained.

20. The interest charged on advances shall for the present be 6¼ per cent. per annum.

21. The local Government may subject to the provisions of rule 20, make rules for the repayment of advances with interest and for regulating the instalments by which advances may be repaid and the place and time of repayment. Any person wishing to repay the advance received by him, or instalments of it, at an earlier date than that fixed in the certificate, may do so with the permission of the Collector.

22. All payments shall be made at the office of the officer in whose sub-division the land to be improved is situated. Such officer shall keep a register of advances and repayments in such form as the local Government may from time to time prescribe for that purpose.

23. Instalments may be suspended by order of the Commissioner for any reason that would justify suspension of the revenue demand. The Commissioner shall report the suspension to the Board of Revenue who, may pass such orders in the case as shall seem proper.

24. No project shall be divided. After an advance has been sanctioned, and the whole or part thereof expended, a second advance shall not be made without the sanction of the local Government.

25. No advance shall be made unless the value of the security offered exceeds by at least one-fourth the amount of the advance.

26. Subject to the orders of the local Government, the Collector shall make provision for the proper inspection of works in course of construction for which advances have been made, and for ascertaining and securing that such advances are duly applied to the purpose for which they were made.

27. The works and any accounts kept of the disbursements upon them shall be at all times open to the inspection of the Collector or other person authorized by him in that behalf.

28. In the case of advances exceeding Rs. 5,000, accounts shall be kept by the recipient of the advance in any form that the Collector may, with the sanction of superior authority, prescribe.

29. If at any time the Collector is satisfied that any person who has received an advance has failed to perform any of the conditions un-

der which it was made, he may, after recording in writing the grounds for the decision he has arrived at, and subject to the control of the superior revenue authorities, proceed to recover from such person, or from any security of such person, under the provisions of the Act, any sums which remain due, together with any interest payable thereon.

30. All works for which advances are made in a lump sum shall be inspected and reported on as soon as possible after the date on which their completion was directed in the certificate; all works for which advances are made by instalments shall be inspected and reported on before each instalment subsequent to the first is paid. No advances shall be given—

(1) to any landowner who is in arrears for the land revenue, or for any advance under the Act;

(2) to any tenant who is in arrears for rent, or for any advance under the Act.

ASSUMPSIT.*

Assumpsit, from the Latin *assumo,* is an *implied* contract, by which a man assumes or takes upon him to perform or pay anything to another, and to which he is bound upon the principles of equity and the just construction of law.

1. If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case; in which he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a sum, which valuation is submitted to the determination of a jury.

2. If one take up goods or wares of a tradesman, without expressly agreeing for the price, there is an implied understanding that the real value of the goods shall be paid, and an action may be brought accordingly.

3. Another implied undertaking is, when one has received money belonging to another, without a consideration given on the receiver's part; for the law construes the money received for the use of the owner only, and implies that the person so receiving it undertook to account

* *Vide* Cabinet Lawyer, Chap. X., p. 469.

for it to the owner. And if he unjustly detain it, an action lies against him, and damages may be recovered. This is an extensive and beneficial remedy, applicable almost to every case where a defendant has received what, in equity and fairness, he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.

4. When a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this undertaking. On this principle it is established that a surety in a bond, who pays the debt of his principal, may recover it by action on the assumpsit, for so much advanced for the use of the principal. But an action will not lie for money paid, when the money has been paid *against the express consent* of the party for whose use it is supposed to have been paid. Neither can money be recovered back when paid for carrying on an *unlawful* undertaking, as an unlicensed theatre, 10 *Bing.* 107.

5. Upon a stated account between two merchants or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other, though there be not any actual promise.

6. The last class of implied contracts arises upon the supposition that every one who undertakes any office, employment, trust, or duty, contracts, with those who employ or entrust him, to perform it with integrity, diligence, and skill. And if, by the want of either of these qualities, any injury accrues to individuals, they have their remedy and damages by a special action on the case. A few instances will suffice.

If a public officer be guilty of a neglect of duty, or a sheriff or jailor suffer a prisoner in custody for debt to escape, or if an attorney betray or wilfully neglect the cause of his client, he is liable for damages.

With an innkeeper, there is an implied contract to secure his guest's goods in his inn; with a common carrier to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a tailor, shoemaker, or other workman, that he performs his business in a workmanlike manner; in which, if they fail, an action on the case lies to recover damages for such breach of their general undertakings. So, too, a surveyor being employed to survey and value premises, upon the security of which money is about to be advanced; if he, through ignorance or negligence, represent the value

of the security to be greater than it is, by which his employer is deceived, he is liable to an action for damages.

But if a person be employed to perform any of these offices, whose common profession or business it is not, the law implies no such general undertaking: in order to charge *him* with damages, a special agreement is necessary.

If any one cheat me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action lies for damages upon the contract: since the law implies that every transaction ought to be fair and honest.

In contracts, likewise, in sales, it is constantly understood that the seller undertakes that the commodity is his own. In contracts for provisions, it is implied that they are *wholesome:* otherwise, in either case, an action lies for damages.

BOMBAY HIGH COURT.

PRESENT:

Mr. Justice Westropp, Chief Justice, and Mr. Justice Nanabhai Haridas.

REG. vs. BUDHA NANKU* and others.

Evidence—Accomplice—Approver's testimony—Corroboration—Confession of co-prisoner.

A conviction based on the testimony of approvers, uncorroborated as to the identity of the accused person, cannot be sustained; and confessions of co-prisoners, implicating him cannot be accepted as sufficient corroboration of such testimony.

In this case the appellants were convicted on the testimony of two approvers who were not corroborated as to the identity of the appellants except by the confessions of other persons tried with them.

The Court (in delivering judgment said) :—

As regards the others, the Court quashes the convictions and sentences on the ground that the approvers Shripatrav and Rama are not corroborated as to the identity of these latter prisoners. The confessions of co-prisoners implicating them cannot, in our opinion, be accepted as evidence to corroborate the testimony of these approvers: See 3 Russell on Crimes, 4th edition, by Greaves, pages 603, 604, and 605, *Reg.* v. *Malapa*† and *Reg.* v. *Chatur Purshotam,* decided on the 7th January 1876 by West and Nánábhái Haridás, JJ.

* *Vide* I. L. R., 1, Bom. Series, p. 475.

† 11, Bom. H. C. Rep., 196.

Speeches of the Members of the Council of the Governor-General of India regarding the introduction of a Bill to define and amend the law relating to the* TRANSFER OF PROPERTY.

THE HON'BLE WHITLEY STOKES :—" As this is a convenient opportunity for stating the views of the Government on codification in India, I propose, with the permission of His Excellency the President, to trouble the Council with some remarks on the subject, premising that they are little but a precis of what learned and enlightened lawyers like John Austin and David Dudley Field have written in England and the United States. As no one ever does so, I need not acknowledge my obligations to their master, Bentham, of whom Talleyrand said *Pille de tout le monde il est toujours riche*.

" In the first place, speaking as I am in India, I feel myself relieved from the necessity of proving the possibility of successful codification. Thanks, chiefly, to the labours of Macaulay, Peacock, Maine, Stephen, William Macpherson (the Secretary to the late Indian Law Commission), and my wise and learned predecessor, to work under whom was not only a privilege, but an education, British India now possesses Codes on the following subjects :—

I. Criminal Law (Act XLV. of 1860).

II. Criminal Procedure (Act X. of 1872).

III. Civil Procedure (Act VIII. of 1859).

IV. Evidence (Act I. of 1872).

V. Contract in General—Sale of Goods—Indemnity and Guarantee—Bailment—Agency—Partnership (Act IX. of 1872.)

VI. Limitation and Prescription (Act IX. of 1871).

VII. Specific Relief (Act I. of 1877).

" These seven Codes apply to persons of every race and religion in British India. There are, besides, the following, which as yet apply only to limited classes of the population :—

VIII. The Succession Act (X. of 1865), which deals with domicile, wills and intestacies.

IX. The Divorce Act (IV. of 1869).†

---

* The Council met at Simla on Thursday, 31st May 1877.

† Besides these, we have comprehensive Acts which may be regarded as Codes, dealing with the following special subjects :—Public Companies (X. of 1866), the Post Office (XIV. of 1866), Telegraphs (I. of 1876), Merchant Seamen (I. of 1859), Sea Customs (VI. of 1863), Inland Customs (VIII. of 1875), Articles of War (V. of 1869), Stamps (XVIII. of 1869),

" Passing over the Specific Relief Act, which has not yet undergone sufficient probation, it is admitted by all unprejudiced and capable persons that, with one exception (the Code of Civil Procedure, Act VIII. of 1859, which will soon be replaced by Act X. of 1877), these Codes are working smoothly, and have been found reasonably adequate to provide for the cases that occur in the administration of the branches of the law with which they respectively deal.

" This being so, one might have supposed that no deliberate pause would have been made in the completion of this great and useful work. But such, unfortunately, is not the case. With the solitary exception of the Guardian and Ward Act XIII. of 1874 (which does not apply to Bengal, Madras, or Bombay), the codifying of our substantive law has since April 1872 totally ceased in India. We know the causes of this cessation, but it would not be expedient to state them.

" Under these circumstances it seems worth while to consider the current objections to codification, and to mention the advantages which may be expected from resuming the work.

" The current objections to codification are four in number. It is said—

(1) that a Code cannot provide for future cases—in other words, that it is necessarily incomplete;

(2) that in the attempt to be systematic and concise, the language of codifiers must be left open to different interpretations;

(3) that a Code is inflexible, and does not adapt itself to the expanding wants of the society for which it is framed; and

(4) that the Codes which have been framed for foreign countries, in particular France and Prussia, have been failures.

" But these objections have often been answered. As to the first, it is true that a Code cannot provide for all cases, but is that any reason for not providing for as many as possible? Moreover (as Austin points out), this objection is equally applicable to all law—whether it be a Code, a body of judiciary law, or a body of judiciary law supplemented by statutes.

Court Fees (VII. of 1870), Expropriation (X. of 1870), Coinage (XXIII. of 1870), Paper Currency (III. of 1871), Emigration (VII. of 1871), Ports and Port-dues (XII. of 1875), Administration by Public Officers of trust and intestate estates (XVII. of 1864 and II. of 1874). In a redistribution of the matter of our law, some of these Acts might form parts of what the New York codifiers call a Political Code.

"The second objection—that the language of a Code must be open to different interpretations—is also equally applicable to judge-made law, the specimens of which manufactured in this country are certainly not always free from ambiguity. But the best reply to this objection is, that in India we can continue to follow the system of using concrete illustrations, and that our experience of the Penal Code shews that this method is admirably adapted to preclude uncertainty as to the meaning of the abstract propositions of which the bulk of a Code consists.

"The objection as to the inflexibility of a Code seems as futile as those already discussed. It comes in India to this, that it is better for the barrister-judges (who, as a rule, lead the High Courts) to make the law as they go along, than for the legislature, aided as it is by the advice of every capable person in the country, to make the law as a guide beforehand. I feel as strongly as any one that the development of a country's law should be, as far as possible, the natural outgrowth of its material and social wants and of its highest ethical ideas. But for ascertaining these wants, for recognizing these ideas, the supreme Indian legislature is, and must always be, far more favourably situated than a body of judges whose experience is as a rule limited to their courts, who are generally ignorant of the languages of the people, and whose ability and learning (considerable as they are at present) will steadily deteriorate as the pecuniary attractions of India diminish. We should remember, too, that the machinery of Indian legislation is singularly swift and simple, and that as soon as the expediency of any amendment is established, there is no difficulty in having it at once effected.

"The last objection—that certain foreign Codes have been failures, and that therefore all codification must fail—hardly requires to be answered. But the answer may as well be given. The Codes referred to—that of Napoleon and the Prussian Code of the Great Frederick—were first attempts, framed when the science of law-making was not understood as it is now. For instance, those Codes contain no definitions technical terms, no explanations of leading principles and distinctions. The result is that they have not superseded the old law, and that they have had to be supplemented by numerous volumes of more or less authoritative interpretations. But such defects are obviously accidental, not inevitable, and they have been avoided in framing the recent German Commercial Code (*das allgemeine Deutsche Handelsgesetzbuch*, 1869) and Penal Code (*Deutsches Strafgesetzbuch*, 1870), the Italian *Codice*

Civile (which is an admirable model), Livingstone's Louisiana Codes, and, I believe, other Codes (those of Holland, Austria, Spain, Lower Canada, Portugal, Brazil), of which I do not speak positively as I have not seen them.

"Another objection (chiefly made by critics with a smattering of German jurisprudence) is that our Codes are not scientific enough; while a still larger body of critics, who are wholly innocent of law, declare loudly that they are too scientific, reminding one of those would-be military authorities who assert that already the arms put into the hands of infantry are superior to the average human capacity for using them with effect. But these criticisms are mutually destructive, and may be left without further notice.

"So much for the practicability of codification and for the objections usually taken against it. Now as to the expediency of continuing, and, if possible, completing the work which has been so well begun in India.

"First of all, it will save the Judges and Pleaders the vast amount of labour now forced upon them in searching for precedents in reports and text-books, which, in the mufassal at least, are seldom thoroughly understood. This, of course, will facilitate the despatch of business, cheapen the cost of litigation and in some places, perhaps, enable us to diminish the number of our Judges.

"Secondly, an untrained Judge (and most of our Judges in India are, and will probably always be, untrained) is far less likely to go wrong in construing a well-framed Code than in drawing inferences from a crowd of half-understood decisions, or in submitting to the guidance of English text-books, written solely with reference to the system of English law—a system from which we, in India, have widely diverged in many important particulars. It is obvious that the number of appeals will thus be greatly lessened, and one urgently needed reform of our system of civil procedure will thus be effected without depriving the Natives in any degree of a right which they have come to regard as an indispensable security.

"Thirdly, the reduction of the whole of our law to a Code would necessarily have the effect of precluding our barrister Judges (and our Civilian Judges misled by barristers) from introducing into India English technicalities and doctrines unknown to litigants and unsuited to this country. Even before the amalgamation of the Supreme and the

Sadr Court this practice had begun, and I could easily produce the most amazing rulings as to champerty, estoppel, laches, inadmissibility of oral evidence, and opening conditional sales which have become absolute. Since that amalgamation the technicalizing of our law has gone on with renewed vigour, and Your Lordship will remember that the Judicial Committee of the Privy Council has recently recommended us to abolish by legislation one of the doctrines so introduced.

"Fourthly, the process of codification affords an opportunity for settling, by legislative enactment, many disputed questions which the Courts would never be able to settle. Take one or two illustrations of what I mean. For years our High Courts had been disputing whether title could be acquired by positive prescription, and as to the time necessary to give an absolute right to the use of light, of a way, of water, or other easements. One learned Judge thought the proper time might be 'four, five, or six years'; some said it was twelve; others twenty; others that the law applicable to India was the English law before the passing of the Prescription Act in 2 and 3 Wm. IV.; others that there was no law at all on the subject. The result was constant and ruinous litigation and great waste of time on the part of the Courts. At last the legislature interposed, and by two short sections (27 and 28 of Act IX. of 1871) settled the matter apparently for ever. So far as I know, not a single serious doubt has been raised during the past six years as to the meaning of these sections. Take, again, the subject of Majority. Hindus, Muhammadans, East Indians, Europeans, Jews, Parsis, had each a different law on this subject. The age of majority according to the Hindu law was, in Bengal, the commencement of the 16th year; elsewhere, the commencement of the 17th year. Then the Courts held that Natives under eighteen were minors for some purposes, but not for others. Till the legislature interposed the state of affairs might be described as insoluble doubt and endless expense and litigation. But the Maharaja of Vizianagram passed his Act (IX. of 1875), and in three months the Courts were happily relieved of a useless and time-consuming branch of their business. Take, again, the question as to what offences can legally be compounded. As to this the High Courts are hopelessly at variance. A single section would remove the difficulty.

"Fifthly, codification would be the safest and easiest method of introducing into the social law of the Natives reforms which are urgently needed, but which only a few of them are enlightened enough to de-

mand. Take, for instance, the abolition of infant marriages. The Courts would never venture to hold such marriages illegal; and the legislature might well hesitate to raise, by an isolated measure, such a storm of excitement as was produced by the Act (XXI. of 1850) declaring that rights should not be forfeited by loss of caste, or by the Act (XV. of 1856) permitting Hindu widows to marry again. But I believe that by a comprehensive measure dealing with the whole law of Husband and Wife, a measure framed with due regard to social needs and physiological laws, we might abolish infant marriages without meeting anything more than the trivial and transitory opposition of a few professional agitators. I mention this merely by way of illustration of my meaning. There is no intention of passing any such law.

"Sixthly, when we possess a complete Code the decisions of the Courts will necessarily be nothing but decisions as to its construction, and the system of reporting, which we have established for the four High Courts at the annual cost of about Rs. 50,000, may then be placed by the inexpensive practice of periodical communications from the Registrars of those tribunals to the Government of India in its Legislative Department. The amendments thus suggested could then be considered and (if approved) made by the legislature.

"I might dwell on other benefits sure to accrue from codification—the diminution of the bulk and expense of the libraries with which lawyers and judges must now be provided at their own cost, or at that of the Government; the improvement in the character of the legal profession which would result from making the law simple and scientific; the diffusion among the people of a more accurate knowledge of their rights and duties than could be obtained in any other manner; the effectiveness of good Codes as instruments of education; the beneficial influence which our Codes would exercise on the legislation of England and some, at all events, of her Colonies. But these results are remote and comparatively unimportant.

"I will now describe with some particularity the work which remains to be done before Indian law can be said to be completely codified.

"First, we have to finish and then to arrange our Code of the law of Contract. Here the following subjects have still to be dealt with: Sales of immovable property; Mortgages and charges on land; Leases; Fixtures; Settlements; Powers; Exchanges; Insurance (Marine, Fire, and Life); Carriers (Marine and Inland); Bottomry, Respondentia and

other liens on Moveables; Negotiable Instruments. All these subjects, with the exception of Exchanges, Carriers, and certain liens on Moveables, were handled by the late Indian Law Commission. We possess their drafts in the Legislative Department, and on one of these drafts the Bill which I now ask leave to introduce is founded.

"As regards the law relating to Persons, we already possess Acts dealing directly or incidentally with Minors and Lunatics, and no further legislation seems necessary at present in this respect.

"Save as regards the infractions provided for by the Penal Code, the law relating to Personal Rights is almost wholly untouched by our legislature. So far as regards the right of protection from bodily injury, defamation and insult, it would be most conveniently dealt with in a Code of the law of Torts or Actionable Wrongs; but to deal with Wrongs, one must obviously first know the correlative Rights, and as in many cases these have not yet been ascertained and declared. I would not now take up this subject of Torts.

"We then come to the law of Personal Relations, namely, Husband and Wife, Parent and Child, Guardian and Ward, Master and Apprentice, Master and Servant. So much of the law of Husband and Wife as relates to the solemnization of Marriage and to Divorce has already been codified so far as regards Christians and persons not professing the Christian, Jewish, Hindu, Muhammadan, Parsi, or Buddhist religion; and I have here only to suggest that it would be convenient to amalgamate the Marriage Acts III. and XV. of 1872, and to withdraw the anomalous power to grant marriage-licenses, which the Presidency High Courts now possess.

"As to Parent and Child, their respective rights and duties, our Statute-book is almost a blank; and some painful litigation as to the rights of fathers to the custody of their children has, consequently, been the result. The law on this subject might easily and usefully be codified; but of course the proposed measure should leave untouched Hindus and Muhammadans, whose parental rights—at all events in the Presidency towns—are secured to them by statute. It might fitly apply to Europeans domiciled in India, East Indians, Armenians, Jews, Native Christians, and probably Parsis.

"The law of Guardian and Ward is already codified, so far only as regards Europeans, their children and grand-children, in territories not under a chartered High Court, by Act XIII. of 1874. I would extend

this law to the rest of British India, and make it apply to the whole population except Hindus, Muhammadans, and perhaps Buddhists.

"The law of Apprentices has been dealt with by Act XIX. of 1850 and a section in Act I. of 1859. But the law of Master and Servant is still uncodified, though various Acts (such as XIII. of 1859 and IX. of 1860), have been stuck patchwise on the mass of reported cases in which the bulk of it is contained. Many of these cases are contradictory: all (except to lawyers in the Presidency towns) are inaccessible; and I think there is no subject which might more fitly be taken up and dealt with in a spirit of fairness to the employer as well as to the employed. Much of the harshness with which Europeans and East Indians sometimes treat Native servants is due, I am convinced, to the absence of any distinct, ascertainable law as to their respective rights and duties.

"The law of property, which would stand next in a scientific arrangement of a Complete Civil Code, is to a large extent dealt with by one of the drafts already mentioned. There seems no pressing need for declaring the law as to certain matters not so covered, such as the property of the State and the ownership of animals wild by nature. There remain the three subjects—all of peculiar importance in India—of Trusts, Servitudes (or Easements) and Boundaries. As to Trusts, though one learned Judge has held (4 Beng. O. C. J. 231) that trusts cannot be created by Hindus, another learned Judge of the same High Court (*ibid.* 134) lays down (I venture to think correctly) that there is no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India, and that possession of dominion over property, coupled with the obligation to use it, either wholly or partially for the benefit of others than the possessor, is familiar to every Hindu. Nevertheless we have no law on this subject save what is scattered through the library called the Equity Reports. Except so far as regards the acquisition of a prescriptive title, the law of Servitudes has also been left untouched by the legislature; and the Indian Courts are consequently left to the guidance (when they can get it) of a host of English cases often conflicting and sometimes unintelligible. The subject of Boundaries in their civil aspect is also untouched save by some local laws dealing with petty matters, such as disputes and the erection and repair of boundary-marks.

"The subjects of Shipping, Corporate Property Patents, Copyright and Trade-marks may also here be mentioned. But with the exception

of Copyright, they have already been dealt with by the Indian legislature well enough, at all events, to render immediate codification unnecessary. As to Copyright, our present law (Act XX. of 1847) does not provide for works of the fine arts, photographs and lectures. It is also defective as to piracies by translations. Our law as to Patterns and Designs (Act XIII. of 1872) is a dead letter.

" We now come to the law relating to the acquisition of Property, by (1) Occupancy or Prescription; (2) Accession; (3) Transfer *inter vivos;* (4) Will; and (5) Succession.

" Prescriptive titles are sufficiently dealt with by the limitation Act IX. of 1871.

" As to acquisition of property by Accession, we have no law as to Fixtures, except what may be revealed by English text-books. The Bill which I now ask leave to introduce deals, I hope, satisfactorily with this subject. The law of Alluvion and Deluvion is in a land like this, of huge, silt-laden and shifting rivers, obviously of the very first importance; but it is still contained in an old Bengal Regulation (XI. of 1825), which is not only incomplete but obscure; and which is encrusted with decisions of the late Sadr Courts, the High Courts, and the Judicial Committee of the Privy Council, many of which are conflicting. Moreover, it does not apply to Sindh, where I believe the only rules on the subject are certain executive orders which, under the Indian Council's Act, section 25, have gained the force of law. The law of Accession to Movable property is untouched, save by sections 155, 156, 157 of Act IX. of 1872.

" Transfer *inter vivos* has, so far as regards sale of moveables, been dealt with by the Contract law, and will, as regards land, be dealt with by the Bill which I now ask leave to introduce, supplemented, as that measure will be, by the Registration Act. But the subject of Gifts *inter vivos* is as yet untouched, though Donations *mortis causâ* are dealt with by the Succession Act.

" Acquisitions under Wills are provided for by Act X. of 1865, so far as regards Europeans, East Indians, Armenians, Jews, Parsis, and Native Christians; so far, also, as regards Hindus in the Lower Provinces and the Presidency Towns. The testamentary portion of this Act might now, I think, usefully be extended to Hindus in the rest of British India. But on this matter the Local Governments must first be consulted.

" Succession *ab intestato* is provided for by the same Act, so far as

regards the whole population except Hindus, Buddhists and Muhammadans.

" I have hitherto said nothing as to the possibility or the expediency of codifying the Native laws. But as the Advocate General of Madras, in a book of which a large number of copies has been sent to the Legislative Department, proposes to codify " the whole Hindu law" —(including, I presume, the law of Ordeals),—a few remarks may be made on this subject.

" There would obviously be great political danger and no practical advantage in codifying the Muhammadan law, which, as every one knows, is founded on the Kuran, and the Traditions and the Maxims which have been developed out of them.

" Speaking roughly, the only parts of the Hindu law (by which I mean the inspired *Dharmasastra*) which are now administered by our Courts relate to Inheritance, Maintenance, Partition of undivided Property, Widow's Estate, Mortgages and Adoption. I exclude the law of Hundis (Native bills of exchange), which, so far as I know, is not divinely revealed, but is merely part of the custom of Hindu merchants. There are serious difficulties in the way of touching any of these laws: first, because they are all believed to be founded on a divine revelation, and great suspicion would certainly be excited if we *mlechchhas* attempted to meddle with them; secondly, because they vary, more or less, in Bengal, Madras and Bombay (take, for example, the power of a widow to adopt a son to her deceased husband), and uniformity, one great object of a Code, could not therefore be secured save with the certainty of change and the probability of such irritation; thirdly, because many of the sources of the Hindu law have either not been translated at all, or (like the *Vyavahara Mayukha*) translated so badly as to mislead rather than guide; fourthly, because even supposing we succeeded in codifying the Hindu law, the result would certainly not be applicable to the Hindus and Sikhs of the Panjab, nor to the non-Aryan and non-Brahmanic population of the south of India, nor, I believe, to the Hindus in the Central Provinces, where local custom overrides Bramanic jurisprudence, nor to the aboriginal hill tribes anywhere; lastly, because by codification we should stereotype laws which, however interesting from the archæological point of view, have (like all laws based on theological ideas) something irrational and inhuman about them. For instance, suppose we codified the Hindu law of Inheritance, we should have to found it on

the notion that the right of each relation to succeed depends on his comparative efficacy in performing the obsequies of the deceased, and we should consequently have to exclude sons who chanced to be either blind or deaf and brothers who were addicted to any vice. Suppose, again, we codified the Hindu law of Adoption, we should have to declare that an orphan could not be adopted, because, forsooth, there is no one to give him to his adoptive parent (2 Madras High Court Reports, 129). This surely is not the kind of jurisprudence that a civilized nation should try to perpetuate. The wisest, and, I believe, the most welcome measure that could possibly be passed affecting the Hindus would be an Act enabling them to discard their own law of property—in other words, to adopt (without prejudice to vested rights) the legal status of Europeans domiciled in India, the change of status being formally registered, publicly announced, and, when once made, absolute and irrevocable. This suggestion is immediately due to Mr. J. D. Mayne's paper *(Madras Journal of Literature and Science,* 1864-65) on the administration of Native law in the Courts of the Madras Presidency, the ablest essay that I have ever read on the subject of the law which should be applied to a conquered nation. The ultimate source of the suggestion is of course the well known decision of the Privy Council in *Abraham* v. *Abraham,* 9, Moore, I. A., 195.

" I have thus, I hope, shewn—

(*a*) that laws may be successfully codified in India,

(*b*) that the current objections to codification are groundless,

(*c*) that it is expedient to continue the work of codification except as regards the native laws,

(*d*) that much remains to be done before that work is complete.

" In determining the order in which subjects should be taken up for codification, we should of course be influenced more by the actual wants of the country than by any love for logical arrangement, legal symmetry or scientific completeness. Bearing this in mind, we should, I think, first take up the three Bills which the late Indian Law Commission framed with a view of completing their Code of Contract law (Act IX. of 1872). These are :—

" The Transfer of Property Bill, which deals with sales of land, mortgages, leases, fixtures, settlements, and powers, and which I now ask leave to introduce.

"The Insurance Bill, which deals with fire, life, and marine insurance.

"The Negotiable Instruments Bill, which deals with Bills of exchange, cheques and promissory notes, and which we propose to make an embodiment of the actual law on the subject in India and England.

"These three Bills no doubt require considerable modifications, but they could in a few months be made most useful measures, and would be welcomed by every one whose interest is not to keep the law obscure and inaccessible. The subject of Fire, Life and Marine Insurance is one of growing importance in India, but (like the law of Master and Servant) it is contained in about two thousand reported English cases, patched with four Acts of the Indian Legislature. The Natives have no other law on this subject, though I believe that Hindu merchants have a custom of insuring goods sent by land or river from one part of British India to another. As regards Negotiable Instruments, no doubt, we should abstain from contravening the custom of Hindu merchants as to hundis. But the proposed law need not be inoperative as to these instruments, for the Calcutta High Court has held that when the analogy between hundis and bills is complete the English law applies. The opportunity too might be taken to remove the doubts whether a hundi payable to order is negotiable without the written endorsement of the payee (1 Hyde, 155); whether notice of dishonour is necessary in the case of a hundi (Coryton, 88). Of course the provisions as to cheques and promissory notes would extend to Natives as well as Europeans.

"We might then take up the subject of Master and Servant, to which I have already referred. The opportunity might be used to amend the law as to the right of servants to compensation for injury caused by the negligence of foremen in their masters' employment, and to enable the Local Governments to establish a system of registering domestic servants.

"The subjects of Alluvion and Diluvion might then be dealt with. In Lower Bengal, in the Panjab and in Sindh a clear and comprehensive law on these subjects is very necessary, and the text-books in the library of the Legislative Department by American and Italian writers would aid us effectively in working up the decisions of the Indian Courts and the Privy Council.

"I would then take up the law of Servitudes or Easements. The subject is, no doubt, most difficult and complicated. But we have the

materials collected in England by Mr. Goddard, one of the gentlemen lately employed under a Royal Commission to prepare a specimen Digest, and we should doubtless receive on such a matter useful suggestions from the local authorities.

"We might then deal with Boundaries. An Act of a very few sections would contain all the rules that are needed on this subject, such as rules as to lateral and subjacent support, trees growing on or near boundaries, the rights of owners of land bordering upon water or bounded by roads, the duties of conterminous owners to maintain boundaries and fences.

"When these measures have been passed, it will be found that the Rights of the population will, to a large extent, have been ascertained and declared. Then (but not till then) we should take up the subject of Torts or Actionable Wrongs, laying down clear rules as to the measure of damages in the case of each. It has been objected (strange to say by a Judge of the Calcutta High Court) that a Code of the law of Torts would suggest kinds of litigation now very rare, if not wholly unknown in India. What if it would? Because the people are now unaware of the existence of their power to obtain redress by civil suit from those who infringe their rights, are we always deliberately to keep them in ignorance of such power?

"But let us examine the learned Judge's vague prophecy. The most cursory inspection of our law reports will shew that the Natives are in the habit of suing for each of the three great classes of wrongs, namely, wrongs to the person (such as assault, malicious prosecution, libel, slander), wrongs to immoveable property (such as trespass, stoppage of water, obstruction of lights), wrongs to moveable property (such as wrongful distress, wrongful attachment, false representation).

"Besides these, the Indian legislature has expressly recognized or provided for suits for loss of caste which, I presume, means suits for compensation for expulsion from caste (Act VIII. of 1859, section 298), false imprisonment (IX. of 1871, schedule II. No. 21), seduction (*ib.* No. 27), obstructing ways and diverting water-courses (*ib.* Nos. 31, 32), taking, damaging or wrongfully detaining moveable property (*ib.* Nos. 26, 33, 34), misuser of property (*ib.* No. 38), infringement of patents (XV. of 1859, sections 22, 23) and of copyright (XX. of 1847, section 7), death caused by actionable wrong (XIII. of 1855), negligence of carriers (III. of 1865, sections 7 and 8), cattle trespass (I. of 1871, Chapter

VII), damage done to goods in a bailee's possession (IX. of 1872, section 180). injury caused to an agent by his principal's neglect or want of skill (IX. of 1872 section 225). It must be admitted that the whole of the English law of torts, except perhaps the law relating to slander of title, has been introduced into, and is actually administered in British India; and if, in codifying that law, it be thought desirable to declare that certain injuries for which an action would now lie in England should not be actionable in India, what can be easier than to do so? I do not know what those injuries are, nor, I suspect, does the learned judge; but we ought to make three amendments in our law of torts: first, we should bar suits, or mere oral abuse (6 Beng. Appendix 99); secondly, we should finally get rid of suits for criminal conversation, which may apparently still be brought by Hindus; and thirdly, we should alter the law in the Presidency towns so as to allow an injured person to bring a civil suit without instituting criminal proceedings.

"The outline of a complete Civil Code would then be nearly filled in. There would remain the subjects of Parent and Child, Trusts, Gifts *inter vivos*, Accession to Moveables, certain Liens on Moveables, Carriers (Marine and Inland). The order of dealing with them is unimportant.

"The difficult task of arranging scientifically the various chapters of the Civil Code thus produced would then remain; and to the finished work we should either prefix or subjoin a chapter containing rules for its interpretation. The materials for this chapter are already collected in the works of Dwarris, Maxwell, and the American Sedgwick; and its enactment would afford a good opportunity for getting rid of the pernicious and illogical distinctions between the modes of construing remedial statutes, penal statutes, and statutes imposing charges on the subject, which have been imported from England by judges more familiar with the common-law than impressed by the importance of giving effect to the wishes of the legislature.

"And now, my Lord, I have nearly done. In carrying out this great work of codification, the Government of India is well aware that it will meet with the hostility of many and (what is worse) the indifference of most of those for whose sake it is undertaken. Some of the judges will, I fear, oppose codification, because when once it is achieved it will limit their discretion and reduce them from their present position of judicial lawgivers to the comparatively humble but useful employment of interpreting and carrying out the will of the legislature. The baser sort of

my own profession (not, I am glad to say, the more enlightened and unselfish members of it) will naturally oppose everything that tends to make the law clear and accessible, and thus to diminish litigation. The Indian public will doubtless be as indifferent to codification as the English public has hitherto proved to be. Nor can Your Lordship, or any of my colleagues, or I myself, hope to earn the fame which is justly due to those who finish a vast and useful work. For the measure which I have sketched out cannot possibly be prepared, criticised and passed into law in less than nine years, and before that time expires we shall all, so far as India is concerned, have attained to official *nirvana.* But let the judges and lawyers be comforted with the assurance that we shall alter as little as may be the substance of the laws with which they are so familiar. The Eumenides shall not say to us, as they said to the younger gods, 'Ye have overridden the ancient laws (*palaious nomous kathippasasthe).*' Let the public be consoled with the pledge that no pains will be spared to make our drafts clear, brief and accurate, and that all competent criticism will be heartily welcomed and carefully utilised. And for us, my Lord, let us be satisfied with the consciousness that we shall have resumed, and to some extent carried out, the policy of providing a simple, compact and uniform system of law for the countless millions who now are, and hereafter will be, living and working and gathering wealth, gaining legal rights and incurring legal liabilities, under the beneficent rule of the Empress of India and her successors."

His Excellency the President said : "The very able exposition of principles, and the lucid and interesting narrative of facts, which the Council has just had the advantage of hearing from the Hon'ble Member, who has asked leave to introduce this Bill, make it unnecessary for me to remind Hon'ble Members that the Bill is part of a great undertaking, and that this undertaking, commenced by men of great eminence and ablility, has been for some time suspended. But I believe I am in a position to inform the Council that the Government of India now resumes the task of codifying the substantive law of India, not only with the sanction, but I think I may say with the sympathy, of the present Secretary of State. This is an encouraging fact.

"My hon'ble colleague has reminded us that codification has been regarded, not only with reluctance, but with some degree of mistrust, by a large and influential body of legal opinion, which has lent its authority to confirm the impression that codification is either not feasible,

or, if it be feasible, not beneficial. However, I noticed with considerable satisfaction some months ago that the Chief Justice of England—of whose genius and patriotism all England is justly proud—did not hesitate, in a public speech he then made, to declare that, in his opinion, the time had come for England herself to follow the example of other civilized States, and make haste to get rid of what a great English Poet has called :

> 'the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances.

"Now it so happens that my own official life, although wholly unconnected with the legal profession, has led me at various times to reside in different continental countries, all of which already possess a completed Civil Code. For instance, I may mention France and Prussia, to which my hon'ble friend has referred, also Austria, Portugal, Italy and Denmark; which latter country was—according to Bentham—the first in Europe to codify its law. Perhaps, then, I may be allowed to record the fact that, in all these countries, codification has been found to be not only feasible but exceedingly beneficial to the whole community, and very conducive to the comfort of all classes. I am quite certain that, both in Prussia and France, the present Civil Code, as now revised and amended, is regarded by the whole population as one of the greatest blessings which Government could have given it. Therefore, I think I am entitled to congratulate my hon'ble colleague, Mr. Stokes, upon having inaugurated his administration of the great Department of Government over which he now presides by the question which I have now put to the Council."

MADRAS HIGH COURT.

The 28th November, 1876.

FULL BENCH:

Before Sir W. Morgan, C. J., Mr. Justice Holloway, Mr. Justice Innes, and Mr. Justice Kindersley.

REG. *vs.* MUTHAVAN* and four others.

Criminal Procedure Code, sec. 188.

The offences of enticing away a married woman with a criminal intent and of criminal breach of trust are not offences which may lawfully be compounded.

Upon a reference, by the District Magistrate of Tinnevelly, of the Proceedings of the 2nd-class Magistrate of Tuticorin in Cases Nos. 275 and 277 of 1876, Counsel not appearing,

The High Court passed the following

RULING.—In the cases reported the 2nd-class Magistrate has allowed prosecutions for the offences of enticing away a married woman with intent to have illicit intercourse, and of criminal breach of trust, respectively, to be withdrawn under Section 188 of the Code of Criminal Procedure.

The District Magistrate submits that the offences in question are not offences which may lawfully be compounded. The High Court agree that the offences of enticing away a married woman with a criminal intent and of criminal breach of trust are not offences which may lawfully be compouned. The circumstances of the cases brought to notice are, however, such as to render active interference on the part of the High Court unnecessary.

[Upon the general question of what offences may be lawfully compounded see *Reg.* v. *Rahimat,* I. L. R. 1 Bom., 147 (Full Bench) and note.]

BOMBAY HIGH COURT.

The 15t*h December,* 1876.

PRESENT:

Mr. Justice Westropp, C. J, and Mr. Justice Sargent.

NATHA HIRA† and another (Plaintiffs,)

vs.

JANARDHAN RAM CHUNDRA and another (Defendants.)

Limitation—Act IX. of 1871, *Schedule II., Cl.* 72*—Promissory note —Novation.*

The holder of a promissory note, payable on demand, dated 14th April 1870, demanded

* *Vide* I. L. R., 1, Madras Series, p. 191.

† *Vide* I. L. R., 1, Bom. Series, 503.

payment on 8th December 1872. The maker then paid interest in advance up to 1st April 1873, upon the condition that the holder should make no demand until that date.

***Held* that this transaction amounted to the substitution of a new contract for that contained in the promissory note; that the period of limitation must be reckoned from 1st April 1873; and that, consequently, a suit to recover the balance due on the note, instituted on 27th March 1876, was not barred.**

The following case was stated for the opinion of the High Court in accordance with Section 55 of Act IX. of 1850 by J. O'Leary, First Judge of the Court of Small Causes at Bombay :—

" 1. The action in this case was brought for the recovery of a balance alleged to be due by the defendants to the plaintiffs on a promissory note, bearing date 14th April 1870.

" 2. The said note purported to be payable on demand.

" 3. The first unqualified demand on the note was made on or about the 8th December 1872.

" 4. This suit was instituted on the 27th March 1876.

" 5. The defendants pleaded the Law of Limitation as a bar to the claim, the first absolute demand having been made more than three years before the institution of the action.

" 6. The plaintiffs contended that the period of limitation ought to be computed from 1st April 1873; and relied upon the following facts (which were proved to the satisfaction of this Court) in support of their contention :—

(*a*) On the 8th December 1872, the defendants made a proposal to the plaintiffs, which, translated into English, was in the following words :—

' We pay you now interest up to the 1st April 1873.

You are not to make any demand upon us until the 1st April 1873.'

(*b*) The plaintiffs at once accepted this proposal.

(*c*) The defendants, immediately on the plaintiffs' acceptance of their proposal as aforesaid, paid to the plaintiffs interest on the note up to the 1st day of April 1873.

(*d*) At the same time one of the defendants (Janardhan Ramchandra) with the knowledge and consent of his co-defendant wrote a memorandum upon the note in the following form :—

' 8th December 1872, paid interest up to 1st April 1873.'

" 7. During the interval of time that elapsed between the 8th

December 1872 and the 1st April 1873, the plaintiffs made no demand for repayment of the amount secured by the note.

" 8. Upon this evidence the Fourth Judge who tried the case disallowed the plea of limitation and gave judgment for the plaintiffs for the amount claimed.

" 9. The defendants obtained a rule *nisi* for a judgment in their favour on the ground that the Fourth Judge was in error in holding that the plaintiffs were entitled to sue within three years from 1st April 1873.

" 10. The First and Fourth Judges, before whom the rule *nisi* came on for argument, discharged the rule subject to the opinion of the the High Court, which we have now the honour to solicit upon the question,

" Whether the plaintiffs were entitled to bring their suit within three years from the 1st April 1873 under the circumstances stated in this case?"

The reference was considered by Westropp, C. J., and Sargent, J.

There was no appearance of the parties either in person or by counsel.

Per Curiam :—We think that the transaction of the 8th December 1872 amounted to the substitution of a new contract for that contained in the promissory note of 14th April 1870, under which new contract the plaintiffs, in consideration of a payment of interest in advance up to the 1st April 1873, agreed to defer their demand for the principal, and to forbear to sue until that day. Hence the period of limitation must be reckoned from that day, and the suit, having been brought on the 27th March 1876, is not barred. The verdict, therefore, should stand.

HIGH COURT, N. W. P.

The 16th December, 1876.

PRESENT:

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

ILAHI BAKSH and others (Defendants)*

vs.

IMAM BAKSH and others (Plaintiffs.)

Act VIII. of 1859, ss. 7, 97—Omission of part of Claim—Withdrawal of Suit—Institution of Fresh Suit, including part of Claim omitted.

Where the plaintiffs in a suit were permitted to withdraw from the same, with a view to bringing a fresh suit which should include a portion which had been omitted of the claim arising out of the cause of action, and such fresh suit was brought, the additional portion of the claim in that suit was not barred by s. 7 of Act VIII. of 1859.

THE COURT (In delivering judgment said):—As to the first plea, it would seem that the reason for which the former suit was withdrawn was that a fresh suit might be brought which should include a portion which had been omitted before of the claim arising out of the cause of action, and the permission to bring the new suit must be reckoned to be permission to supply the former omission. This being so, we are of opinion that the additional portion of the claim in this suit is not barred by s. 7, Act VIII. of 1859. A similar view was taken in special appeal case No. 180 of 1876, decided by a Bench of this Court on the 28th April last.[1]

[1] In that case the application for permission to withdraw the former suit was based on the ground that a portion of the claim arising out of the cause of action had by mistake been omitted to be included in the plaint with which that suit had been commenced, and on that ground permission for the withdrawal of the suit, and to bring a fresh suit was accorded. Under these circumstances the Court (Pearson and Spankie, JJ.) was of opinion that it would not be fair or reasonable to hold that the aforesaid portion of the claim could not be entertained in the fresh suit, although it might be true that the defect in the former plaint might have been amended without recourse to the provisions of s. 97 of Act VIII. of 1859.

* *Vide* I. L. R., 1, All. Series p. 324.

PRIVY COUNCIL.

The 9th, 16th, 17th and 18th May, 1876.

PRESENT :

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

On Appeal from Calcutta High Court.

KHAJOOROONISSA* (Defendant) *Appellant,*

versus

ROWSHAN JEHAN (Plaintiff) *Respondent.*

Compromise—Appeal—Fraud—Mahomedan Law—Devolution of Property—Deed of Gift—Will—Presumption of Marriage.

In a suit brought on behalf of an infant daughter by her mother as guardian, a decision was given partly for and partly against the defendant, who there upon filed an appeal, which he afterwards withdrew in accordance with the terms of a compromise purporting to have been made with the mother and daughter. Subsequently, at the suit of the daughter, the compromise was set aside as fraudulent and collusive, and a review of the original decision, in so far as it was adverse to the plaintiff's interest, was allowed. The defendant then applied that his appeal might be revived, but his application was rejected by the High Court, on the ground that he had deprived himself of his opportunity of appeal by his own fraudulent conduct. *Held*, by the Judicial Committee, that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff was to be allowed to be heard against so much of the original judgment as was unfavorable to her, the defendant must similarly be heard against so much of the same judgment as was unfavorable to him.

The policy of the Mahomedan law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property may defeat the policy of the law by giving in his lifetime the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. This may be done by a deed of gift without consideration, or by deed of gift for consideration. A conveyance by deed of gift without consideration is invalid, unless accompanied by delivery of the thing given so far as it admits of delivery. In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration; but there must be an actual payment of the consideration by the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property and to confer it on the donee. It is incumbent on those who set up transactions of this nature, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with.

By the Mahomedan law, a testator may bequeath one-third of his estate to a stranger, but cannot leave a legacy to one of his heirs without the consent of the rest. A will purporting to give one-third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share, *held* to be an attempt to give, under color

* *Vide* I. L. R., 2, Calc Series, p. 184.

of a religious bequest, a legacy to one of the testator's heirs, and to be invalid without the confirmation of the other heirs.

Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises under the Mahomedan law that the son's mother was his father's wife.

SIR ROBERT P. COLLIER:—This case, which fills a great mass of printed paper, and has occupied much time, finally resolves itself into a few points not attended with any very great difficulty. In order to make those points intelligible, a short history of the whole case appears to be necessary. Rajah *Deedar Hossein* died in 1841, possessed of half of the large zemindary of *Soorjapore.* He left five sons and five daughters. According to the contention of the one side he left five widows; according to the contention of the other side he left one wife and four concubines. *Enayut Hossein,* his eldest son, possessed himself of all the property of the deceased Rajah by virtue of two documents which he set up, and which will have to be referred to subsequently, one being a deed of gift as it is called, and the other a will, both dated the 18th of November, 1839, about two years before the death of the Rajah.

The first document purported to convey to *Enayut* one-third of the zemindary. The will may be shortly described as giving to *Enayut Hossein* a third of what remained, burdened with a trust of a somewhat indefinite character for pious uses, but with a bequest of the residue after those pious uses had been satisfied to the beneficial use of *Enayut* himself. *Enayut* was put into possession of the whole of the landed property, and it was directed that the other children were not to be enabled to sell or dispose of their shares in any way. *Enayut* was to pay them certain annuities, which he does not appear to have done, and it was only of the personal property that a division was directed in accordance with the Mahomedan law. By virtue of these documents *Enayut* took possession of the property of his father, and appears to have reduced the other members of the family to a state of poverty. He struggled for some time to obtain mutation of names, in pursuance of these documents. The mutation was opposed by other members of the family, but was finally obtained in 1844 upon *Enayut* giving security. After that time some abortive suits were instituted by different members of the family *in formâ pauperis;* but the first proceeding necessary to notice at all at length, is a suit instituted by *Khoobunissa,* who was the widow of *Nuseeroodeen,* the third son of Rajah *Deedar Hossein,* in 1852,

as guardian and protector of her infant daughter *Rowshan Jehan* (the present Plaintiff), to set aside both the deed and the will, and to obtain possession on behalf of her daughter of a fourteen annas share (the daughter's share) of the property of *Nuzeeroodeen*. She appears to have also brought a suit for the other two annas on her own behalf.

This suit came to be heard before Mr. *Loch*, who was the Judge at *Purneah* in 1855. His decision was to the effect that both the documents, the deed and the will, were in fact executed by the Rajah *Deedar*; that the deed was valid, but that the will was invalid because it had not obtained the consent of the heirs other than *Enayut*, which according to his view of the will was necessary by the Mahomedan law. *Enayut Hossein* appealed against that decision, and *Khoobunissa* would have had an undoubted right to her cross appeal but for what subsequently transpired. Pending this suit, which was decided in 1855, *Enayut Hossein* had instituted a cross suit against *Khoobunissa* for the purpose of carrying into effect an alleged compromise to which he said she was a party, he alleging that she had received some Rs. 31,000, and had executed a document compromising the suit in his favour. This she denied. Issues were raised upon it, and this case came on for trial in August, 1856, rather more than a year after the other decision. But on the 30th of August of that year a compromise, which in some respects may be undoubtedly called a real compromise, was come to. *Khoobunissa* then filed a document, in which she declared that she would not any longer contest the questions between her and *Enayut Hossein*; that she had received certain money from him, and agreed altogether to his terms, and in that document there was a statement that her daughter *Rowshan Jehan* assented to this compromise. *Rowshan Jehan* was also represented as a party to the transaction, and as asserting herself to be of age. That compromise was given effect to by Mr. *Loch*; it was also given effect to by the Sudder Dewanny Adawlut Court, which dismissed the appeal, and gave a decree in the terms of it in December, 1856.

Rowshan Jehan, the present Plaintiff, in 1859 married *Syud Ahmed Reza*, a member of the other branch of the family, who possessed the half of the pergunnah *Soorjapore* other than that which was held by *Deedar Hossein*; and in 1860 she filed a suit, in which she asserted that she was no party to and had no knowledge of the compromise between *Enayut* and her mother, and that it was effected by fraud and collusion on the part of both of them. She prayed that that compromise might

be set aside, and she prayed in substance for a review of the judgment of Mr. *Lock,* so far as it was against her. She made also three further claims; the first to a share derived by her father from his brother *Edoo Hossein,* who had died before him; the second to a share in right of her grandmother, *Bibee Loodhun,* whom she alleged to have been a wife of *Deedar Hossein.* She thirdly claimed that there should be added to the whole zemindary property a portion which *Enayut Hossein* had recovered by a decree of this Board against the *Rezas,* in respect of the right of his grandmother *Ranee Sumree.* It may be as well at once to dismiss this part of the case, by stating that it is not now denied on the part of *Enayut* that he recovered this sum, not in his own right, but as a trustee for all the other members of the family.

This suit appears to have been deplorably dealt with in the inferior Courts of *India.* It came first before Mr. *Beaufort,* who framed a certain number of issues, and proceeded as far as deciding the issues in bar. Then it came before Mr. *Birch,* who upset all that Mr. *Beaufort* had done, and dismissed the suit altogether in a summary manner, on the ground that the cause of action was not stated with sufficient precision. The High Court set this mistake right by remanding the cause to be retried; whereupon it came before Mr. *Simson,* who had succeeded Mr. *Birch.* Mr. *Simson,* who seems to have very imperfectly apprehended the nature of the suit, framed an issue, which by no means decided it, and after his trial (if it can be so called) of the case, it came before the High Court again, and was again remanded. This occurred in January or February, 1864, when a very careful and luminous judgment was given by the Chief Justice Sir *Barnes Peacock* and another member of the Court, which it is now necessary more particularly to refer to. The High Court, after stating that the case had not been properly tried or even apprehended, remanded it for the following issues to be tried, in addition to the one laid down by Mr. *Simson,* which was as to the validity of the deed. "1. Was the Plaintiff of age according to the Mahomedan law, independently of Regulation XXVI. of 1793, at the time when the alleged compromise was effected? 2. Did the Plaintiff execute the documents which purport to have been executed by her, or any and which of them? 3. If so, was she induced to execute the same by means of fraud or misrepresentation? 4. Was the compromise a fair one and beneficial to the Plaintiff? 5. Did the Plaintiff receive any portion of the money alleged to have been paid

by the Defendant or any portion of the profits of the putnee talook? 6. Did the Plaintiff's mother *Khoobunissa* receive the money? 7. Were all or any and which of the receipts, alleged by the Defendant in his written statement to have been executed by the Plaintiff, executed by her? 8. Was the decree in the Zillah Court of *Purneah* of the 30th of August, 1856, establishing the receipt for the Rs. 31,400, obtained by fraud or misrepresentation? 9. Was the decree of the Sudder Court of the 10th of December, 1856, founded on the alleged compromise, obtained by fraud or misrepresentation? 10. If not, was it binding on the Plaintiff as carrying out an arrangement beneficial to her, which her mother, as her guardian, was competent to enter into?" The High Court proceed to say, "These are the issues which we consider necessary for a proper determination of the Plaintiff's right to set aside the decree of the Sudder Court. It appears to us that this appeal is in the nature of a bill for a review of judgment, and therefore when the decree is set aside by virtue of a regular suit, the same rights will arise as if the Court upon review of judgment had set aside its own decree." Then they go on to say: "The above issues will apply of course to the Plaintiff's claim only so far as affects that portion of *Deedar Hossein's* property which was the subject of the former suit, but they do not apply to the shares which belonged to her uncle and her grandmother, or to the share of the property recovered by the Defendant by the decree of the Privy Council. These are wholly distinct matters from that at issue before Mr. *Loch,* and therefore as to them we think it proper to lay down the following issues to be tried by the Judge." Then come six more issues: "1. Did the father of the Plaintiff survive her uncle *Edoo Hossein,* and is the Plaintiff entitled to recover any and what portion of the share, if any, of her uncle *Edoo Hossein* in the estate of the Plaintiff's late grandfather Rajah *Deedar Hossein?* 2. Did *Edoo Hossein* receive the allowance given by his father's will, or assent to the will? 3. Did the Plaintiff's grandmother, *Mussamut Bibee Loodhun,* alias *Saemah,* succeed to any and what portion of the estate of Rajah *Deedar Hossein?* 4. Did *Bibee Loodhun* take the allowance as alleged in the Defendant's written statement? 5. Is the Plaintiff entitled to recover any and what portion of *Bibee Loodhun's* share, if any, of Rajah *Deedar Hossein's* estate? 6. Is the Plaintiff entitled to recover any and what portion of the one anna eight gundas share of the zemindary of *Soorjapore,* recovered by the Defendant under decree of the Privy Council dated the 11th of July, 1859?"

All the first ten issues which related to the validity of the compromise in the suit which was heard before Mr. *Loch*, and came before the Sudder Dewanny Adawlut, were decided by the Judge, Mr. *Muspratt*, before whom this case came on its remand, in favour of the Plaintiff. With respect to the latter issues, the Judge found against the Plaintiff upon the question of *Edoo Hossein* surviving his brother *Nuzeeroodeen*, her father, and he found against her on the question of her right to succeed to any portion of the property of her grandmother *Bibee Loodhun*. The case came on appeal before the High Court, who gave a very elaborate judgment in January, 1866. The High Court agreed with the learned Judge of the Zillah Court in his finding on all the ten issues relating to the compromise, and there being two concurrent findings upon these issues, which are questions of fact, their Lordships are by no means disposed to disturb them. Indeed, it has scarcely been argued that, giving effect to the rule on this subject, they should be disturbed.

The High Court next came to the conclusion that the compromise being set aside, owing to fraud and collusion on the part of part of *Enayut Hossein*, *Enayut Hossein's* right of appeal against Mr. *Loch's* judgment was not revived, whereas the right of appeal on the part of the Plaintiff *Rowshan Jehan* was revived. From that finding their Lordships differ. It appears to them that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the Plaintiff is to be allowed to be heard to appeal against so much of the decision of Mr. *Loch* as is against her, *Enayut Hossein* ought to be heard to appeal against so much of the decision as is against him. The High Court further affirm the decision of Mr. *Loch* on the subject of the will, which was in favour of the Plaintiff, but they reverse his decision so far as it concerns the deed, which was against her. Further, they reverse the decision of Mr. *Muspratt* upon the two questions of the right of the Plaintiff to succeed to *Edoo Hossein*, and her right to succeed to her grandmother. The case, therefore, reduces itself to four questions,—first, the validity of the deed; secondly, the validity of the will; thirdly, the survivorship between *Edoo* and *Nuzeeroodeen*; and, fourthly, the Plaintiff's right to succeed to her grandmother.

The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a

holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to shew very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with. There is no question of the execution by Rajah *Deedar Hossein* of this deed giving one-third to his son *Enayut* on the 10th of November, 1839. The deed was either—to use English expressions—a deed of gift simply, or a deed of gift for a consideration. If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of delivery, or, in other words, by what is termed in the books a seisin on the part of the donee. In their Lordships' judgment there was no delivery of this kind. Even assuming that although the estate was under attachment, a sufficient seisin in it remained to the donor which he could impart to the donee, still it appears by the evidence of Mr. *Perry*, which is treated as trustworthy on both sides, that in point of fact Rajah *Deedar Hossein* remained in receipt of the rents and profits of the property until his death. Therefore if the deed were a mere deed of gift there was not that delivery of possession which was necessary to give it effect by Mahomedan law. A question which was touched upon, though not much argued, viz., whether the doctrine of Mahomedan law relating to "confusion of gifts" applied, appears not to arise, as there was no delivery of possession.

But it was contended that this was a deed of gift for a consideration, and therefore that the delivery of possession was not necessary. It was, however, conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, viz., an actual payment of the consideration on the part of the donee, and a *boná fide* intention on the part of the donor to divest himself *in presenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be actually and *boná fide* paid.

Upon the subject of consideration there is the evidence of Mr. *Perry*,

who was present at the time of the execution of the document, who says that the Rajah admitted that at some previous time he had received the consideration. There is the evidence of *Enayut Hossein* himself, who speaks to having paid the consideration, although he does not condescend to any particulars; and there is the evidence of one or two other witnesses, who speak of the consideration being given at the time of the execution, which appears scarcely reconcilable with the evidence of Mr. *Perry*. But the whole transaction must be looked to. Mr. *Perry* speaks, as far as his knowledge is concerned, of the deed remaining in the possession of Rajah *Deedar Hossein*, although no doubt there is some evidence to the opposite effect. But it is certain that no proceeding was taken for obtaining mutation of names for more than twelve months after the execution of the deed. A petition was presented on the 16th of March, 1841, purporting to be on the part of the Rajah, and requesting a mutation of names, and there was another by *Enayut* on the 3rd of May of that year. But, on the 19th of June of that year, the Rajah *Deedar* presented a petition altogether repudiating the transaction, declaring that he had received no consideration money whatever, that it was not intended that any transfer should take place until after his death, and praying that the mutation of names should not be effected. On being questioned what his real wishes were, he still persisted in declaring his wish that *Enayut* should not be substituted for him in the books of the Collectorate. It is true that on the 19th of November, 1841, a petition was laid before the Collector, purporting to come from *Deedar Hossein*, in which he set up the transaction, declaring that he had received the consideration money, and desiring that the name of his son should be entered, but that was several days after he was dead. He died on the 15th. The petition was dated on the 14th, received on the 19th, and the Collector very properly declined to act upon it. No evidence was given as to the state of the Rajah when he executed this petition, so shortly before his death (if indeed he did execute it), although Rajah *Enayut Hossein* and *Heera Lall*, the mokhtar who was concerned in it, either of whom could probably have given information on the subject, were not examined as witnesses in the cause.

Taking into consideration all these circumstances, their Lordships have come to the conclusion that the transaction set up on behalf of the Defendants was not a real one, that no real consideration passed, that there was no intention on the part of the Rajah to part with the pro-

perty at once to his son, but that both father and son were endeavouring to evade the Mahomedan law, by representing that to be a present transfer of property which was intended only to operate after the father's death. Their Lordships therefore agree with the High Court in their view of the effect of the deed.

The next question arises as to the will. It was found as a fact by Mr. *Loch* that the heirs had not consented to this will; and with that finding their Lordships are satisfied. But it was argued by Mr. *Cowie*, first, that the will did not require confirmation; secondly, that at all events so much of it as gave one-third to *Enayut Hossein* for pious uses was not in contravention of Mahomedan law, and was therefore valid without confirmation. The effect of the will is, in the first place, to declare *Enayut Hossein* the executor and representative of *Deedar*, and to direct him to look after the zemindary, and so forth. Then follows this passage: "I divide the remaining two-thirds now under my possession, uninterfered and unconcerned by any one else, into three portions. One portion to be laid out as the executor may think proper for the testator's welfare hereafter, by charity and pilgrimage, and keep up the family usage, namely, the expenses of the mosque and tazeeadaree of the sacred martyrs, and for the comfort of the travellers, the surplus amount to be appropriated by himself, the executor." Then it goes on to say, from the other two-thirds "he shall keep every one by his good conduct and affection contented and satisfied. It is also necessary for all persons having rights, heirs, and friends connected with me to obey the said executor and consider him my representative." Then further: "None of the heirs have power to sell or divide the landed property mentioned in the will." This will, in its general scope, appears to their Lordships to be in contravention of Mahomedan law. With respect to the limited contention, that it may be supported with respect to the devise of the one-third share, it appears further to their Lordships that that devise, considering the vague character of it, and that the beneficial interest is left to *Enayut Hossein* after he has devoted what he may deem sufficient to certain indefinite pious uses, is in reality an attempt to give, under colour of a religious bequest, an interest in one-third to *Enayut Hossein*, in contravention of Mahomedan law.

The survivorship between *Edoo* and *Nuzeeroodeen* is a question made by no means clear on either side. Mr. *Muspratt* appears to have decided it almost, if not entirely, upon the ground that *Enayut Hossein*

put in certain proceedings *in formâ pauperis*, the petition to sue and other documents, purporting to have been executed by *Edoo* in 1845. If he did then execute them, undoubtedly he had survived his brother, who died in January or February, 1844. There appears to have been oral evidence on both sides; on the one side, that *Edoo* lived until 1845, on the other, that he died some time in 1843, a few months before his brother. The judgment of the High Court appears to be in effect that after a very careful consideration of these documents, after directing various searches for the originals, of which attested copies were produced, which searches proved fruitless, they have come to the conclusion that these documents are not genuine. Their Lordships do not feel that sufficient is laid before them to satisfy them that the High Court were wrong in that decision. These documents being rejected as fabricated, the Court say in substance that they credit the testimony of the Plaintiff rather than that of the Defendant, who had shewn himself capable of fabricating documents, and that they do not in this question believe witnesses who on other parts of the case had not been believed.

Under these circumstances, whatever might have been their Lordships' view if the case had come before them as a tribunal of first instance, they do not think that sufficient ground has been shewn for reversing the decision of the High Court.

There remains the question of the right of the Plaintiff to succeed to *Bibee Loodhun*, and that depends upon whether *Bibee Loodhun* was merely a concubine or a wife. It is an undisputed fact that *Nuzeeroodeen*, the son of *Bibee Loodhun*, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasions recognised by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances appears to have been laid down in a case which has been referred to, *Khajah Hidayut Oollah* v. *Rai Jan Khanum*,* in which Dr. *Lushington*, who delivered the judgment of this Board, makes this observation†: "The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection,

* 3, Moore's Ind. Ap. Ca., 295. † Page 318.

and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such marriage having taken place." In this case there is no evidence that *Bebee Loodhun* was a woman of bad character, or that her connection was merely casual. She appears to have lived in the house at all events up to the death of the Rajah.

The same doctrine was laid down rather more strongly in a recent case, which came before this Board on the 20th of March, 1873. In the case of *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan*, a case from *Oudh*, and a Sheeah case, their Lordship say: "This treatment of the daughter by the Appellants"—that is to say, the treatment of the daughter as a member of the family,—"affords a strong presumption in favour of the right of her mother to inherit from her." The question there was whether the mother, who was said to be a slave girl, inherited from her daughter, whom she survived, the same question which would have arisen in this case if *Bibee Loodhun* had survived her son *Nuzeeroodeen*. Their Lordships go on to say, after noticing various acts of acknowledgment of the legitimacy of the child: "After these acknowledgments, *Mulka Jehan* and the Appellants who act with her ought in their Lordships' view to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence, they think the presumption must prevail."

It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of *Nuzeeroodeen* raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted. The evidence chiefly relied upon for that purpose is the will of the Rajah, in which undoubtedly there is this expression: "For the maintenance of four female servants monthly, 75; annually 900," and *Bibee Loodhun* does appear to have been one of those female servants there mentioned. At the same time, it is to be observed, this expression occurs only in the schedule; whereas in a part of the will preceding that schedule there is this expression: "The shares of the executor and of the sons, daughters, and wives of the testator and other claimants from the estate fixed annually at," so and so; and the subsequent provision for the maintenance of every female servant appears to be an expansion of that paragraph in which they are spoken of as wives.

But further, there is the undoubted acknowledgment by *Enayut Hossein* himself of *Bibee Loodhun* being a wife, inasmuch as when *Khyroonissa* the principal wife brings a suit against him, *Enayut Hossein* objects, on the ground that *Bibee Loodhun*, one of the other wives, is not joined.

Under these circumstances, it appears to their Lordships that there is evidence not only from the acknowledgment ot *Nuzeeroodeen's* legitimacy by the family, but from the admission of *Enayut Hossein*, that *Bibee Loodhun* was a wife, and not merely a servant. It is indeed alleged that she was what is called a temporary wife, and among the Sheeah sect there appears to be a power of taking a mere temporary wife. But it is to be observed that there is no evidence of her marriage being what is called a temporary marriage, and indeed the witnesses who seek to impugn the marriage on the part of the Defendant speak of *Bibee Loodhun* not as a temporary wife but as a mere servant. The question, therefore, seems to be not whether she was a temporary wife in the sense attached to that term in Mahomedan treatises, but whether she was a wife or whether she was a mere servant. On the whole, their Lordships concur with the finding of the High Court. The evidence preponderates that she was a wife and not as mere servant, though no doubt a wife of an inferior order.

A question further arose as to the amount of the share which the Plaintiff would be entitled to, assuming that *Bibee Loodhun* was a wife, and it would certainly seem that her share would only be a fifth of an eighth, that is, a fortieth share; whereas she appears to have received something more by the decree of the Court. But it is to be observed that this in a great measure is a matter of detail, and possibly a clerical error or miscalculation, which might have been set right on an application to the High Court, and that in fact the High Court did invite applications for the purpose of remedying errors of this kind.

The result is, that with the exception of the slight variation of amount in the case of the claim of *Mussamut Bibee Loodhun*, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

BOMBAY HIGH COURT.

The 18th March, 1875.

PRESENT:

Mr. Justice Kemball and Mr. Justice Nanabhai Haridas.

KRISHNARAV JAHAGIRDAR* (Plaintiff)

versus

GOVIND TRIMBAK (Defendant.)

Suit by one of two co-sharers to oust a tenant.

Where a suit was brought by one of two co-sharers to recover land from a tenant, not only in the absence of, but against the express desire of, the other co-sharer :

Held that the suit was not maintainable, and that the plaintiff could only sue jointly with his co-sharer, though the plaintiff was sole manager of the joint estate.

KEMBALL, J. :—This is a suit brought by one of two co-sharers in certain *inám* villages to recover possession of two fields, some trees, and a well from an admitted tenant. In the course of the suit, the other co-sharer was made a co-plaintiff, and he filed a statement denying the right of his co-sharer to sue alone, and declaring that the suit was brought without his consent, he being desirous of allowing the defendant to remain in possession so long as he paid the rent. The relationship of landlord and tenant is admitted, so that the only issue for disposal before us in this Regular Appeal is whether the plaintiff is entitled to sue in his own name and person to oust the tenant. It appears that, although the Judge has found that the plaintiff alone manages the village, lets out lands, and takes them back at his pleasure, still that right has never been acquiesced in by the co-sharer Dámodharráv, and that only three years ago the plaintiff in this case brought his suit against Dámodhar to establish his right to manage when a decree was taken by consent, Exhibit 30, in which it was held that the plaintiff had failed to prove that he was the sole manager, and it was directed that in future he should transact the business with the consent of Dámodharráv, providing at the same time for any losses that might accrue in the event of the one acting without the assent of the other. Assuming that the Judge is right, in the face of the award above quoted, in holding that the plaintiff did manage the village in question so as to bind his co-sharer by his acts, we think it impossible to hold that he (plaintiff) is empowered by his position to bring a suit, not only in the absence, but against the express wish, of his co-sharer. In support of the

* *Vide* 12, Bom. H. C. Rep., p. 85.

Judge's decree, we have had quoted to us the judgment of this Court to be found at page 141 of the seventh volume of the reports. We do not think, however, that that judgment has any application to the present case, it having been held there that, where a tenant chose to pay a co-sharer other than *the recognized* representative, he was bound at the suit of such representative to pay over again. We need not express any opinion on that ruling, for the question does not arise here. On the other hand, the judgment in S. A. No. 379 of 1873, decided on the 1st April 1874, has been brought to our notice, which exactly meets the present case. In that suit, one of three co-sharers sought to obtain rent and oust a tenant, and the District Court, in reversing the decree of the Court of first instance, held that the plaintiff, as eldest representative manager, could alone maintain his action, but in Special Appeal, it was ruled that the plaintiff could only sue jointly with his co-sharers, and in that decision we concur. We must, therefore, reverse the decree of the District Judge without prejudice, however, to any right which either of these two co-parceners may hereafter, either by voluntary partition or by a partition made in a suit between themselves only, acquire to proceed severally against the defendant to recover the lands in dispute, and we order that the plaintiff do pay the costs throughout.

PRIVY COUNCIL.

The 3rd and 4th November, 1876.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, and Sir Robert P. Collier.

On Appeal from Allahabad High Court.

NARAIN SINGH* and others (Plaintiffs)

versus

SHIMBHOO SINGH and others (Defendants).

Dispossession of second by first Mortgagee—Re-entry of Mortgagor after first Mortgage satisfied—Cause of Action.

In a suit brought in 1872 by the representatives of a second mortgagee to recover possession of the mortgaged land from the representatives of the mortgagor, it appeared that the second mortgagee had been placed in possession thereof in 1846 by decree of Court, but had in 1847 been dispossessed at the suit of the first mortgagees, upon whose being paid off in 1870 the mortgagor re-entered upon the land :—

* Vide 4, Law Reports, Indian Appeals, p. 15.

Held (reversing the decision of the High Court of *Allahabad*), that such entry gave a cause of action to the second mortgagee, and that he was entitled to resume possession of the mortgaged land. The decree of the first Court, which was in favour of the Appellants, was also reversed, so far as it decreed interest upon the mortgage-money during dispossession.

SIR BARNES PEACOCK:—In this case the Plaintiffs, as sons and heirs of *Poohup Singh*, a mortgagee, seek to recover possession of 20 biswahs of the zemindary right of mouzah *Lallpoor*. The Defendants in the suit are the representatives of the mortgagor. The Plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, *Poohup Singh*, "in that, under a mortgage deed, dated *Phagoon Badi*, 7th Sumbut, 1896, *Poohup Singh*, the ancestor of the Plaintiffs, having obtained a decree from the Sudder Ameen's Court, was put in possession on the 31st of August, 1846." Most of the Defendants admit the claim, but the Defendants, *Man Singh*, *Shimbhoo Girdharee*, and *Motee* put in an answer, by the second paragraph of which they admitted that under the former decree the Plaintiffs' ancestor was in possession for upwards of a year; but they set up, in the fourth paragraph of the same written statement, that "the mortgage alleged by the Plaintiffs is wholly unfounded. The Defendants' ancestor did not receive the mortgage money from the ancestor of the Plaintiffs; and *Poohup Singh*, the ancestor of the Plaintiffs, was a person notorious for his expertness in court affairs. He had, with a view to deprive *Asaram* and *Sheololl* of their mortgage money, obtained by deception a decree on the mortgage deed in suit; and the Defendants' father had, according to the Shasters, no right to transfer and waste the Defendants' ancestral property, without any legal necessity, to satisfy illegal demands. Hence, under the Shasters also, the mortgage alleged by the Plaintiffs is invalid, and the claim is unjust."

Now, having admitted that the Plaintiffs' ancestor did obtain possession by virtue of a decree, and that he remained in possession for a year, the Defendants also, in the same written statement, alleged that the mortgage was collusive and a benamee transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the Defendants' statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the Plaintiff's ancestor did get into possession on the 31st of August, 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, *Asaram*

and *Sheololl.* He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage deed do not appear, but, as far as can be collected, it was a mortgage bond, by which it was stipulated that in the event of the non-payment of the mortgage debt within five years, the mortgagors would cause a mutation of names, and the Plaintiffs to be put into possession.

It appears that the Plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree obtained upon that document gave the Plaintiffs as mortgagees a title to the land as against the Defendants, but it gave them no title as against the prior mortgagees, *Asaram* and *Sheololl.* When *Asaram* and *Sheololl* turned the Plaintiff's ancestor out of possession, it did not destroy his title and right to the land. It may have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to *Asaram* and *Sheololl*, but it did not destroy the right which the Plaintiffs obtained against the Defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues :—first, whether the original mortgagors executed the mortgage deed in respect of the property in suit on receiving the full mortgage consideration, or whether it was collusively secured without payment of any mortgage consideration, and whether the mortgage deed could take effect against the Defendants according to the Hindu law. The Judge says in his judgment : " It is apparent that Plaintiffs' predecessor on the former occasion obtained a decree for possession on proving the mortgage deed, and the payment of mortgage consideration ; and the fact of the decree having been made is admitted by the Defendants. Again, all the Defendants, excepting four, two of whom have made no defence, confess the claim, which is further supported by the evidence of *Moulvie Inayut Alli,* pleader, *Choonnee Loll,* putwaree, and two other persons, both named *Hoolasee,* witnesses for Plaintiffs. The plea urged by Defendants must therefore be overruled ; and they have failed to refute the claim." He therefore gave a decree in favour of the Plaintiffs.

Upon that an appeal was preferred by *Shimbhoo* alone to the High Court ; and one of his grounds of appeal is that there was " no cause of action and foundation for the Plaintiffs' suit ; neither the deed of mortgage nor the decree has been produced ; the conditions agreed upon be-

tween the parties cannot be ascertained." The High Court, having heard the case argued, gave judgment, and reversed the decision of the first Court. They say that "the High Court's order of the 1st of April, 1872, could not give any legitimate cause of action. Nor did any right of action accrue to the Plaintiffs by reason of the satisfaction of the debt of *Asaram* and *Sheololl*, and the recovery of possession of the estate by the mortgagors or their heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the Plaintiff by reason of the satisfaction of the debt of *Asaram* and *Sheololl*, and the recovery of possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870 the title of the Plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then when their title became a valid and a good title the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it, and keep the possession from the Plaintiffs; and it appears to their Lordships, that having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land to which the Plaintiffs had obtained a right under the second mortgage gave them a cause of action against the mortgagors, the Defendants. The Court proceed: "The right of the Plaintiffs or their forefather to possession was created by the mortgage deed of 1840, and was capable of being legally enforced within a period of twelve years. It was the subject of a former suit and of a decree which was fully executed." So it was; but then that decree gave the Plaintiffs a title. The High Court proceeded: "The dispossession of *Poohup Singh* after the execution of that decree was not an illegal proceeding." It is true it was not an illegal proceeding, because he was dispossessed by persons who had better title; namely, the first mortgagees. The Court go on: "Although he was thereby deprived of the right he had obtained, he had a remedy, of which he might have availed himself, by suing within the proper period for the recovery of the money lent by him to the mortgagors. The present suit is clearly inadmissible, and cannot be decreed even against the confessing Defendants." The High Court held that the Plaintiffs' suit was barred by limitation.

It appears, however, to their Lordships, that the Plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause

of action accrued when the Plaintiffs after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by *Poohup Singh,* the Plaintiffs' ancestor. In the first place, as already stated, the written statement of the Defendants admits that there was that former decree. They say that "under the former decree the Plaintiffs' ancestor was in possession for upwards of a year," and then he was turned out by the first mortgagees. Again, when *Asaram* and *Sheololl,* the first mortgagees, brought an action against the second mortgagee, *Pertab Singh,* the ancestor of the Plaintiffs, and *Lulloo* and others, the zemindars, the mortgagors were also made parties to that suit. And in that suit it appears that the decree of *Pertab Singh* against the zemindars was in evidence. The Sudder Court says: "The Plaintiffs sued *Lulloo* and others, zemindars of the above-named village, for possession on a mortgage bond dated the 18th Kower, 1859 Sumbut; but in consequence of their having omitted to specify the nature of the tenure, they were nonsuited. *Poohup Singh* also sued the zemindars on a mortgage bond, and obtained a decree, which was upheld in appeal." There was a finding then in that case that *Poohup Singh* did sue the zemindars on the mortgage bond, and that he obtained a decree against them. Further, when the first mortgage had been paid off, and the Plaintiffs had been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against the mortgagors, and they applied to the Court for an execution of that decree. The Moonsiff decided that they were entitled to have an execution. In that suit, *Shimbhoo,* who is the present Defendant, was one of the parties, and in that case the judgment was produced. The Moonsiff says: "The record of the case having been brought forward, it appears that the objection of the Defendants, judgment debtors," that is, of *Shimbhoo,* one of the present Defendants, "is that *Poohup Singh,* the original decree holder and deceased ancestor of the Plaintiffs, had been put in possession by the Court after the passing of the decree." It appears, therefore, to their Lordships, that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the Plaintiffs were mortgagees, and that they obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is, "to recover possession as mortgagees over the entire 20 biswahs zemindaree right in mouzah *Lallpoor*, pergunnah *Garee*, within the jurisdiction of the *Iglass Tehselee*, valued at Rs. 5000,"—the valuation is not a matter of importance,—"the principal amount of the mortgage loan, and to recover Rs. 6999 15*a*. 0*p*. interest thereon, during the period of the mortgagee's dispossession, as per detail given below, aggregating Rs. 11,999." Now the Plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be, how much is due to the Plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem. The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for Rs. 6999 interest, in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to what the judgment ought to be. He says: "Claim to recover possession as mortagees over the entire 20 biswahs zemindaree right in mouzah *Lallpoor*, pergunnah *Garee*, valued at Rs. 5000, principal of the mortgage loan, and Rs. 6999 15*a*. 0*p*. interest on the mortgage amount." Then he says: "Ordered that Plaintiffs' claim be decreed with costs against the Defendants, that the pleaders get their fees." Then he says:—"Subject matter of decree. Recovery of possession as mortgagees, over the entire 20 biswahs right in mouzah *Lallpoor*, pergunnah *Garee*, valued at Rs. 5000, the principal amount of the mortgage loan, and of Rs. 6999 15*a*. 0*p*. interest on the mortgage amount for the period of the Plaintiff's dispossession; total Rs. 11,999 15*a*. 0*p*." If by that decree the lower Court intended to give the Plaintiff a decree not only for recovery of the possession of the land, but also to recover Rs. 6999 in money as interest, it appears to their Lordships that that judgment, so far as giving a decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court should be modified by confining the recovery of the Plaintiffs merely to

the possession of the land. In that case, the Plaintiffs having got possession of the land, the question, as before observed, will remain open until the Defendants seek to redeem the land. Then the question will arise, how much is due to the Plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage.

Their Lordships, therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the lower Court, so far only as it decrees possession to the Plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the Appellants are entitled to the costs of this appeal.

HIGH COURT, N. W. P.

The 20th April, 1876.

PRESENT :

Sir Robert Stuart, *Kt., Chief Justice,* and Pearson, Turner, Spankie, and Oldfield, JJ.

HANUMAN PARSHAD* (Plaintiff) *Appellant,*

versus

KAULESAR PANDEY (Defendant) *Respondent.*

Enhancement of Rent—Act X. of 1859, *ss.* 3, 4—*Act XVIII. of* 1873, *ss.* 5, 6—*Rent in Kind.*

A rent in kind *(bhaoli)* which, though it varies yearly in amount with the varying amount of the yearly produce, is fixed as to the proportion it is to bear to such produce, is a fixed rent within the meaning of s. 3 of Act X. of 1859 (corresponding with s. 5 of Act XVIII. of 1873), and the tenant is entitled to claim the presumption of law declared in s. 4 of Act X. of 1859 (corresponding with s. 6 of Act XVIII. of 1873).

Stuart, C. J., Turner, Spankie, and Oldfield, JJ., concurred in the following opinion :—

This suit falls to be decided under Act X. of 1859. By the third section of that Act it was declared that ryots who, in the Provinces therein mentioned, hold lands at fixed rates which have not been changed since the permanent settlement are entitled to receive pottahs at those rates. This provision was introduced to give effect to the design announced by Government, when it established the permanent settlement, that the ryot as well as the zemindar should derive benefit from the boon. There is nothing in the section which limits its operation only

* *Vide* I. L. R., 1, All. Series, p. 301.

to ryots who pay rent in cash. Ryots who pay rent in grain may, therefore, claim the privilege, if they can establish that the rates at which they have held their lands are fixed rates. In the case suggested the land is held on the terms that the tenant shall render to the landlord in each year a fixed share of the crop. The quantity of produce delivered may vary in each year, but the rate or share remains the same, be it a fourth or a third or a half, as the case may be. The rate of rent does not vary although its quantum or value may. If then the tenant proves that no alteration in the rate has been made since the permanent settlement, or entitles himself to the benefit of the presumption declared in s. 4 of the Act, he may demand a pottah at these rates as fixed rates.

PEARSON, J. (separately gave a concurring judgment.)

CALCUTTA HIGH COURT.

The 21st June, 1877.

PRESENT:

Mr. Justice Markby and Mr. Justice Prinsep.

THE EMPRESS *vs.* MARY DONELLY.

Revival of Prosecution after Discharge—Power of Magistrate to give evidence in a case in which he is the Sole Judge.

Held, that a Magistrate cannot by his own order revive proceedings where no further evidence is procurable which was not before the Court on the first occasion.

Held, also, that a Judge who is a sole Judge of law and fact cannot give his own evidence, and then proceed to a decision of the case in which evidence is given.

MARKBY, J.—On the 13th of April a summons was issued by the Magistrate of Howrah for the appearance of the petitioner, Mary Donelly, on a charge under Section 262, Indian Penal Code, of using a postage stamp which had been previously used. On the 27th, after the examination of three witnesses for the prosecution and one for the defence, the petitioner was discharged, under Section 215, but upon the representation of the Postmaster of Howrah as to the nature of the evidence adduced, the Magistrate on the 30th April issued his warrant to apprehend the petitioner upon the same charge. She was brought up again upon the 4th of May, and the same three witnesses were again examined for the prosecution; another witness was also examined, who had been bound over to appear upon the former occasion, but whom the Magistrate did not then think it necessary to examine. The Ma-

gistrate, on the second occasion, also gave his own evidence on oath upon a merely formal matter. On the 9th May the petitioner was convicted and sentenced to rigorous imprisonment for two months.

The petitioner appealed to the Sessions Judge of Hooghly, who on the 28th of May affirmed the conviction and sentence.

The petitioner then applied to this Court to set aside the conviction as illegal—(1) because the Magistrate had no power to revive the prosecution against the petitioner after she had been discharged, and (2) because the Magistrate could not appear as a witness in a case in which he was the sole Judge. On the argument of the case, it was also contended that there was no evidence which would support a conviction.

As regards the last point, we intimated at the close of the argument for the petitioner, that there was some evidence. Of course we express no opinion whatever as to the sufficiency or otherwise of that evidence; that is a matter into which this Court does not enter upon an application of this kind. Nor is it desirable to comment upon this evidence; but I may say, with reference to an argument used by Mr. Jackson, that in my opinion that evidence does not consist solely of the comparison of handwriting made by the Magistrate.

I proceed now to examine the grounds of law taken in the petition.

With regard to the power of the Magistrate to revive proceedings against an accused person who has been discharged under Section 215, the law provides by that section that a discharge under it is not equivalent to an acquittal, and does not bar the revival of the prosecution for the same offence. By Section 142, also, any Magistrate duly empowered in any case in which he is competent to try or commit for trial, may without any complaint take cognizance of any offence which he suspects to have been committed, and may issue process to compel the suspected persons to appear. These two sections appear, no doubt, to leave the Magistrate, if properly qualified, free to revive any case he likes, whether the discharge be illegal, whether it be improper upon the evidence, whether it appears to the Magistrate that another offence has been committed than that charged, or whether fresh evidence which was not previously forthcoming has come to his knowledge. And the Magistrate could under the sections revive not only any case heard by himself, but any case heard by another Magistrate subordinate to himself; and having revived it, he could under Section 44 send it back to the Magistrate who ordered the discharge for enquiry

or trial. And this is precisely the same where there is a discharge under Section 195 upon an enquiry by a Magistrate with a view to commitment to the Sessions or to the High Court. For all cases of discharge, therefore, the Magistrate would, under the section appear to have the most absolute and uncontrolled power of reviving the proceedings against the accused.

That this, however, was not the intention of the Legislature is obvious from the provisions of Sections 295 and 296. A special proceeding is provided by Section 295 for the case in which an order (which in my opinion includes an order of discharge) is found to be illegal. All that the Magistrate can then do is to report the proceeding for the records of the High Court. So by Section 296, if it appears to the Magistrate that some other offence has been committed than that of which the accused person has been discharged, he may direct the Subordinate Magistrate to enquire into that offence; but this he can only do in a case which, when before that Magistrate, was a Sessions case. If the Magistrate at the same time possessed the unlimited power of reviving proceedings in all cases of discharge and sending them down to his subordinates for further enquiry, which Sections 44, 142, 195 and 215 at first sight appear to give him, these provisions would be wholly meaningless.

It is this difficulty of reconciling the provisions of Sections 295 and 296 with the extensive powers conferred by the earlier sections that seems to me to render it necessary to put some restriction upon the literal meaning of those earlier sections, and taking the whole Act, the only conclusion I can come to is that the Legislature did not intend that the Magistrate should, as a general rule, have any power at all of revision over the proceedings of Subordinate Magistrates in cases of discharge. Section 296 gives that power in one special case only. If a Magistrate, therefore, thinks a discharge illegal or improper, it must be brought before the High Court, in the first case, by a report of the Magistrate under Section 295; in the second case, by an application under Section 297, when the High Court will, if the discharge was improper, order the accused to be tried or committed for trial. On the other hand, if there is any fresh evidence forthcoming, which was not before the Court when the first enquiry was held, then there is no necessity to revive the previous proceedings at all, and the Magistrate can proceed without any reference to the High Court. This seems to me to

be a reasonable construction of the Act, and it is the only way in which I can reconsider all its provisions. That distinction was, I believe, first suggested in a reference by the Officiating Sessions Judge of Sylhet in a case reported in 20, W. R., 46. The learned Judges of this Court do not then say whether they approve of that distinction, but they affirm the order of the Magistrate who had remanded the case for a fresh enquiry upon the ground of there being "further evidence procurable which was not before the Court when order of discharge was given," and not as the Sessions Judge points out on the ground of there being a "failure of justice." But in a subsequent case three Judges of this Court held that a Magistrate could not of his own motion revive a case where the accused had been discharged without examining all the witnesses for the prosecution. I was a party to this judgment, and of course it was not our intention to overrule the decision of the late Chief Justice and Mr. Justice Glover in 20, W. R. We could not do so; and it seems to me that these decisions are reconcilable in the way I have mentioned. I therefore hold that a Magistrate cannot by his own order revive proceedings where no further evidence is procurable which was not before the Court on the first occasion.

The only question, therefore, is whether in this case there was on the second occasion any such further evidence. I think there was not. Indeed, I confess I have great difficulty in understanding what the first evidence is said to be. The petitioner was charged with using a defaced stamp; the envelope of the letter upon which the stamp was, was before the Court on the first occasion, and it is not denied that the stamp was also before the Court on that occasion, but it is said that a certain word, which was at that time written partly upon the stamp and partly upon the letter, was not before the Court as evidence. How that is possible I really cannot understand. I agree with the Sessions Judge entirely that this evidence was before the Magistrate on the first occasion, but its effect had been overlooked.

As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to revolve itself into this. Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence?

It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance

of this kind has however been found, and no authority of any Judge or text-writer has been cited in support of such a proposition. The English cases (they are very few and very old) do not go further than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same time (per Norman 4, B. L. R. App. Cr., 187). No case in England is cited in which even under these circumstances a Judge has been called as witness in a trial on which he was sitting later than the trial of Lord Stafford.

Two cases are cited as having occurred in this country—one in the N. A. Rep. for 1857, pt. 2, p. 85, and the other the case before Mr. Justice Norman above referred to. That learned Judge went into the matter on that occasion very fully; and having carefully considered his judgment, I have come to the conclusion that he did not intend to carry the law beyond that which he lays down as the result of the English cases. He is very careful to point out that in the case before the late Nizamut Adawlat, the trial took place with the assistance of a Muhammadan law officer, who might have given a Futwa acquitting the prisoner, and that if he had done so the Judge who gave that evidence could not have convicted him, but could only have referred the matter to the Nizamut Adawlut. Then he says at p. 19:

"Prior to the enactment of the Code of Criminal Procedure, when a Sessions Judge was trying a case with the assistance of a Muhammadan law officer, it would seem from the case cited and from the analogy of the English cases referred to, that the Judge might have given evidence in a case tried before himself. By the substitution of a system of trial with assessors, a different species of check was introduced. The assessors give their opinions, which the Judge is bound to record. The Judge must transmit an abstract of a trial to the High Court, and on perusal of such abstract the Court may call for the record."

The learned Judge seems therefore to think that the presence of the assessors brings the case within the rule which he had derived from the English cases. Whether this is quite correct is, I think, open to some question, and it is not quite consistent with what the learned Judge had himself asserted in an earlier part of his judgment. But that appears to me to have been the view at which the learned Judge ultimately arrived.

In the absence therefore of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness, I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a Judge to give evidence even when there are other Judges besides himself. For my own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. But these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hand. He has no one to restrain, correct or check him. If he gives evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination, or contradict it by other testimony. I need say nothing of the indecency of such a proceeding; no one dare venture to defend it. The Judge would therefore give his evidence without the usual safe guards against false testimony—a position which has been over and over again repudiated.

It was contended by Mr. Bell that the appeal to a higher Court was a check upon the Judge. To some extent it may be so, but not a sufficient one. The Appeal Court would deal with the evidence including that of the Judge. But in my opinion the evidence of the Judge being practically incapable of challenge or contradiction ought not to be even taken. Moreover, a Court of Appeal is not a check in the same way that Judges sitting together are a check upon each other. I am therefore of opinion that a Judge who is a sole Judge of law and fact cannot give his own evidence, and then proceed to a decision of the case in which that evidence is given, and that upon this ground, also, the conviction is bad, but as Mr. Justice Prinsep has some doubts about quashing the conviction on this ground, it is better that our judgment should proceed upon the first ground only.

The conviction and sentence are set aside. No application has however been made to us to order further proceedings, and we do not consider it necessary of our own motion to direct any further proceedings against the accused.

PRINSEP, J.—It is unnecessary to repeat the facts connected with the case now before us, as they have been already fully stated.

It is sought to set aside the conviction passed by the Magistrate on three grounds—(1) because the evidence is not sufficient in law; (2)

because the Magistrate, being a witness for the prosecution, is not competent to try it as the sole Judge of law and fact; (3) because, having discharged the accused under Section 215 of the Code of Criminal Procedure, the Magistrate was not competent to review the proceedings and try the accused.

On the first point, I entirely agree with my learned colleague that there is evidence which, if believed, is sufficient for the conviction of the petitioner. That evidence, as pointed out by Mr. Justice Markby, does not consist solely of a comparison of handwriting, and I am not prepared also to assent to the proposition contended for by Mr. Jackson, that to establish an inference from a comparison of handwriting the evidence of an expert is absolutely necessary. Of course it is most desirable, but to lay this down as an absolute rule would in nearly every case in this country exclude such evidence because experts are not procurable. The powers given to Appellate Revisional Courts are sufficient to correct any misapplication of such evidence.

But before leaving this part of the case, I desire to state emphatically that I express no opinion on the value of that evidence or on the guilt or innocence of the petitioner.

On the second point, I consider that the authorities quoted in the judgment of Mr. Justice Norman, reported at 4 B. L. R. 18, Appellate Criminal Jurisdiction, are conclusive that one who is sitting as a sole Judge is not a competent also to be a witness. No case has been quoted in which this has ever occurred, and the inexpediency of such a rule as well as its possible evil results are too obvious to call for explanation. The case cited by Mr. Bell does not establish this rule, or go further than to state that a Judge is not competent to state in the judgment, or to consider facts which can only come from the mouth of a witness.

But in the present case, I am not inclined to set aside the proceedings on this ground, because it seems to me that Mr. Pellew's evidence was immaterial, and that if it be put out of consideration, there is evidence which, if believed, would be sufficient for the conviction of the petitioner.

On the last point as to the competency of a Magistrate to revive a case after he has passed an order of discharge under Section 215, I find that several decisions of this Court restrict this power to cases in which there may be some fresh evidence forthcoming. Had this point been before us for the first time, I should not be disposed to question a Ma-

gistrate's competency, provided that he is invested with the power described in Section 142; but I do not feel justified in the present case in adhering to that opinion, which is opposed to that of so many Judges of matured experience.

That there is no evidence which can properly be called fresh evidence is to my mind clear. The Magistrate considers that on the definition of evidence and document in the Evidence Act, he is entitled to consider the word "stamped" written across the obliterated stamp to be fresh evidence, because his attention was not directed to it, but I find it impossible to disconnect the word "stamped" from the actual stamp which admittedly was in evidence, or to hold that anything which a Magistrate or Judge may accidentally overlook, and which it is difficult to understand how he could not have seen, can be deemed to be *fresh* evidence when his attention is especially directed to what is practically a part of it. In this case, also, the Magistrate's own statement as a witness leaves it in doubt whether his attention was not drawn by the Postmaster to the word stamped.

Then, the statement of the cook recorded only after the order of discharge, is it as contended fresh evidence? But even if it was not previously recorded, it is clear that the nature of that statement was known to the Magistrate from the Police report on which he discharged the accused. He alludes to that statement in his letter to the Postmaster reporting the result of the case, and he did not think it necessary to examine that witness who had been bound over by the Police to appear before him.

Under these circumstances, I concur in quashing the conviction and proceedings taken subsequent to the order of the Magistrate discharging the accused, holding that under the rulings of this Court the Magistrate was not competent to revive the case, and I further am of of opinion that we should not on our motion direct proceedings to be revived.

The order will render it unnecessary to consider the propriety of the sentence passed.

CALCUTTA HIGH COURT.

The 9th, 10th and 14th May, 1877.

PRESENT:

Mr. Justice Macpherson.

ANDERSON WRIGHT AND CO., *vs.* BEER REINHOLD AND CO.

Extension of time for fulfilling the terms of a Contract—Breach of Contract—Damages.

Where the defendants were not shewn to have contracted with reference to any sub-contract, or to any intention on the part of the plaintiffs to ship tallow (the subject of contract) to Europe, it was *held* that, in the absence of notice of such an intention, there was nothing in the nature of the article which necessarily made it known to the defendants that it was being bought for export; *held* also, that the plaintiffs are not entitled to recover by way of damages what they might have made by shipment, or what they have lost by reason of having been unable to perform sub-contracts, and that they must fall black on the ordinary rule, and take the difference of price between the contract rate and the market rate at the time of the breach.

Messrs. J. D. Bell and T. A. Apcar, instructed by Messrs. Sanderson and Co., for the plaintiffs.

Messrs. Jackson and Stokoe, instructed by Messrs. Chauntrell and and Co., for the defendants.

This was a suit brought by the plaintiffs, a well-known firm of merchants of Calcutta, to recover the sum of Rs. 4,507 damages, which they alleged they had sustained by reason of the defendants having failed to deliver certain tallow which the plaintiffs had bought from them.

The plaintiffs' case was that on the 17th August 1875 they purchased of the defendants, through Messrs. W. Moran and Co., 100 tons of pure refined hard tallow, at Rs. 18 per cwt., delivery to be given and taken at Howrah Railway Station from October 1875 to February 1876, as required by the buyers, who were to give a week's clear notice for despatch. The defendants delivered portions of the tallow during October, November, and December 1875, and January 1876, and the plaintiffs, at their request, extended the time for delivery to the end of March. On the 31st March the defendants had only delivered 973 cwts. of tallow, and the plaintiffs on that day wrote to the defendants asking them to telegraph whether they agreed to a claim for Rs. 3,831 as the amount of the plaintiffs' estimated loss of profit on the transaction, or whether the plaintiffs should buy in tallow against them.

On the 24th April the plaintiffs learnt that the defendants refused to admit their claim, and they at once bought in a small quantity of tallow against the defendants, and the sum now claimed was the difference between the price so paid and the contract rate on the balance of the contract.

The defendants admitted the breach of contract, but maintained that the difference between the contract price and the market rate of the day on the 31st March 1876 was only Re. 1, which would make the amount payable by them in respect to the breach Rs. 1,050. The defendants further alleged that on the 12th July 1876 their solicitors, Messrs. Chauntrell and Co. paid the sum of Rs. 1,050 to Mr. Upton, of Messrs. Berners and Co., the plaintiffs' solicitors, in full satisfaction of the plaintiffs' claim, and that it was so accepted by them, though they subsequently, when sending a receipt, treated it as a payment on account.

Messrs. Berners and Co. denied receiving this amount as a payment in full, and alleged that they only received it pending a reference to their principals, who refused to accept it in full satisfaction of their claim ; and the correspondence which is usual in such cases, having passed between these two firms, the money was ultimately handed back by Messrs. Berners and Co. to Messrs. Chauntrell and Co., who received it under protest.

The judgment of the Court was as follows :—

MACPHERSON, J.—In this case the contract is admitted; the extension of time for delivery under the contract up to the 31st March 1876, is admitted; and the breach of contract is also admitted. Two questions only remain to be disposed of: first, what damages the defendants became, by reason of the breach, liable to pay to the plaintiffs; and, secondly, what is the effect of the payment which was made to Mr. Upton, as solicitor for the plaintiffs. As regards the damages, there are two points to be decided—that is, as of what date the damages are to be ascertained, and on what principle they are to be ascertained. The date, I think, is the 31st March, on which the breach took place. It is clear that on the 31st March the plaintiffs considered the whole matter at an end, and made a claim for Rs. 3,831 as damages; and, although a certain amount of correspondence took place between the parties from that time onward, up to about the 27th April, the defendants never asked for further time, and they did nothing which, so far as I can see, at all alters the date on

which the damages are to be ascertained. Then comes the question as to the principle on which they are to be ascertained. The plaintiffs first demanded Rs. 3,831, being what they considered to be the profit they would have made if the defendants had fulfilled their contract. The plaintiffs, judging from information received from England, considered that they would on the whole have been better off by Rs. 3,831 if the defendants had completed their deliveries, and all the tallow had been shipped to Europe. But as to any claim for damages founded on the price which the plaintiffs might have got if they had sent these goods to Europe under sub-contracts or otherwise, there is this defect in the plaintiffs' case, that the defendants are not shown to have contracted with reference to any sub-contract, or to any intention on the part of the plaintiffs to ship the tallow to Europe; and in the absence of notice of such an intention, there was nothing in the nature of the article which necessarily made it known to the defendants that it was being bought for export. This being so, it is quite clear from the case of Williams *vs.* Reynolds (6 Best and Smith's Reports 495; 34 L. J. Q. B. 221) and other cases, that the plaintiffs are not entitled to recover by way of damages what they might have made by shipment, or what they have lost by reason of having been unable to perform sub-contracts, and that they must fall back on the ordinary rule, and take the difference of price between the contract rate and the market rate at the time of the breach. The plaintiffs themselves have evidently felt that this is the true measure of damages. They at first claimed for loss of profit, but when the defendants repudiated their liability for any damage save the difference in the market price on the 31st March, they henceforth claimed only the difference in the market price, though disagreeing with the defendants as to the date, the rate of which was to be taken. In the plaint the only damages claimed are calculated solely on the difference in the market value in the end of April or the beginning of May. When, however, we come to consider what the market value was, this difference arises, that the tallow for the delivery of which the defendants had contracted was in fact an article which at the time of the breach was not in the market at all. This is stated in the plaint, and is referred to by the plaintiffs repeatedly in their correspondence. All the evidence shows that there is no market for tallow save during the cold season, which does not extend beyond February, during which season alone it can be prepared successfully; and that on the 31st March the tallow season was

over, and there was none to be had, except a few casks here and there. That a small quantity can be purchased for retail purposes does not constitute a market for the purpose of the present question ; and it is proved that whatever price had been offered, the article was not forthcoming, and the plaintiffs could not have obtained anything approaching to the quantity short delivered by the defendants. The case is in this respect very much like that of Hinde *vs.* Liddell (10 L. R. Q. B. 265) and the other cases there referred to. There was no tallow to be had in the market, and therefore it is impossible to say what the market price really was. I think, therefore, that if the defendants had not tendered to the plaintiffs a sum representing a difference of Re. 1 in market value per cwt., the plaintiffs would have had great difficulty in establishing their right to substantial damages at all. In the case of Hinde *vs.* Liddell Elbinger &c. *vs.* Armstrong (9 L. R. Q. B.) and Borries *vs.* Hutchinson (34 L. R. C. P.), the defendants had contracted with knowledge of the purpose for which the plaintiffs required the goods ; and therefore, in the absence of any evidence of the market value, it was possible to measure the defendants' liability by the loss of profit, &c. But all these cases differ from the present case in this, that the defendants here are not proved to have had any notice or knowledge that the goods were bought for shipment.

But supposing I could hold that there was any market value for tallow, or any tallow in the market, I should then find as a fact that it is not proved that the rate claimed by the plaintiffs was the true market rate, and that there is at the least as much evidence to show that Rs. 19 was the true rate as there is to support the plaintiffs' claim. Mr. Posner says that Rs. 19 was in his opinion the full market price ; and on the 28th April (when the price was probably higher than it was on the 1st of that month) he did in fact sell a small lot of 10 to 15 casks at Rs. 18, with delivery on or before the 15th May. That sale was not made by Posner with any view to this suit, though it was bought from him with such a view ; and I do not see why I should not take Rs. 19 as a full price on the opinion of Mr. Posner, notwithstanding that Mr. Fornaro considers Rs. 22 to have been the rate at the beginning of April. Mr. Fornaro speaks of no actual transactions (there were in fact none at all, save for an occasional small parcel at retail prices), but says simply that from the information he received from time to time, the price was in his opinion about Rs. 22. Mr. Fornaro says

that he was interested in the subject, having orders to buy, and that the article was not to be had in any quantity, on any terms. So far as there was any market for it, the price of the article was no doubt higher than it had been, for it would naturally rise as the season passed away, and as small quantities only came to be procurable; and the defendants admit that it was higher by one rupee per cwt. As they admit this, and tendered the difference at that rate, I think the plaintiffs are entitled to damages at the rate of Re. 1 per cwt., but to nothing more; in other words, they are entitled only to the sum which was paid by the defendants' solicitors to Mr. Upton. The tender then made was, so far as I can judge, a fair offer on the part of the defendants, and should have been accepted. At any rate, it was a substantial offer, and, before rejecting it, the plaintiffs would have done wisely if they had stopped to consider accurately what their position really was.

As matters stand, the plaintiffs' suit must be dismissed, with costs on scale No. 2. The Rs. 1,050 which were paid to Mr. Upton, and are now in the hands of the defendants' attorneys, will be applied towards payment of their costs.

CALCUTTA HIGH COURT.

The 7th May, 1877.

Mr. Justice Pitt Kennedy.

HARAN CHUNDRA CHATTERJEA,

vs.

SRIMATI DOIAMOI DASSI.

Will—Probate—Party having no interest.

Where it was sought to obtain probate of a will concerning property stated by the testatrix to be her *stridhan* property, *held*, the factum of the will having been established, that if the property be not *stridhan*, the testatrix's husband's mother (who is not under any circumstances heir to any property which a Hindu widow has power to dispose of) suffers no injustice by the granting of the probate, as the decree does not prejudice any rights she may have.

This was a suit brought to establish the will of one Srimati Durgamoni Dassi, who died at the Medical College Hospital in February 1875 of lock-jaw.

The issues before the Court were—

1. Is the document whereof probate is now sought, the last will and testament of the said Srimati Durgamoni Dassi, deceased?

2. Was the said Srimati Durgamoni Dassi, at the time the said document is alleged to have been executed, of sufficiently sound mind to make a will?

3. Has the caveator any interest in this suit?

KENNEDY, J.—Haranchundra Chatterjea seeks to obtain probate of the document propounded as a will. He is resisted by Doiamoi, who sets forward her title as being the heiress of Durgamoni's husband, and who would therefore be entitled to succeed to the property which Durgamoni took by inheritance from her husband.

It seems to me that Doiamoi has no such interest as entitles her to contest the validity of the document.

The Court must still settle the other issues of the case, because it must satisfy itself as to the factum. But it weighs on the consideration of the Court that no person entitled contests the validity of the document.

It is quite clear a husband's mother is not under any circumstances heir to any property which a Hindu widow has power to dispose of. The property of Durgamoni derived from her husband goes to the heir of her husband, whether she died testate or not.

* * * * * * * * * * * * * * * I feel bound to pronounce in favor of the will. The case was one which required investigation.

If the impugnant had any interest in the suit, I should feel bound to give her costs out of the estate, but she had none.

Costs have been incurred by concurrent mistake of both parties in allowing the case to come so far; therefore the impugnant is not to be responsible for costs of the other side.

Each party must bear their own costs.

The impugnant suffers no injustice if the property is not *stridhan* property, and this decree does not prejudice any rights she may have.

CALCUTTA HIGH COURT.

The 14th and 21st June, 1877.

PRESENT:

Mr. Justice Markby and Mr. Justice Prinsep.

THE QUEEN on the prosecution of JADOO NATH GHOSE and others,

versus

BROJO NATH DEY.

Municipal Act (Act III. B. C. of 1864)—*Nullity of order made by Municipal Commissioners to stop up a road.*

No power to stop up or divert public highways is any where in express terms given by Act III. (B. C.) of 1864, to the Municipal Commissioners. The only powers which Municipal Commissioners have over them is to make, repair and keep properly cleansed the highways, and to do such things upon them as are necessary for conservancy. Any order passed by the Vice-Chairman of a Municipality to close up a road must be considered to be a nullity.

Babu Troilokynath Mittra for the appellants Jadoo Nath Ghose and others.

Babu Tarak Nath Dutt for the respondent Brojo Nath Dey.

This was an appeal from an order passed by Mr. A. H. Haggard, Joint Magistrate of Serampore, under Section 521 of the Code of Criminal Procedure; and the facts of the case were as follows:—

One Brojonath Dey, a wealthy zemindar of Serampore, possessed a piece of land on the banks of the river at Mahesh in Serampore, and across the middle of this land there was a foot-path to the river, which the people of the adjacent neighbourhood used for the purpose of going to and from the river.

In the beginning of the year 1869, the Babu erected two turnstiles across this foot-path, which had the effect of obstructing the way.

The people in the vicinity having preferred a complaint, the then Magistrate of Serampore, Mr. J. A. Hopkins, having taken evidence and personally satisfied himself that the obstruction existed, found the zemindar's servant, under Section 253 of the Indian Penal Code, guilty of the offence of obstructing a public road, and sentenced him to pay a fine of Rs. 2, and ordered the zemindar to remove the obstruction within 24 hours.

Upon this the zemindar appears to have brought some kind of a suit in the Munsiff's Court of Serampore, which was dismissed by him

and by the Subordinate Judge on appeal; and this latter judgment was upheld by the High Court in Special Appeal (Kemp and Paul, J.J.), the learned Judges in their judgment making the following observations: "Looking to the frame of the plaint, it is clear that the main object of this suit was to have the plaintiffs' title confirmed over the disputed road, on the allegation that the road which had been pronounced by the Magistrate to be a public thoroughfare was in reality the private property of the plaintiffs * * * but it is very clear that the plaintiff intentionally brought his action in the Civil Court in order to raise again the question already disposed of by the Magistrate, and concerning which the Civil Court had no jurisdiction."

Disappointed in the Civil Court, the zemindar appears to have waited patiently for the transfer of Mr. Hopkins, and on this taking place, he, in August 1874, petitioned the Municipal Commissioners of Serampore to be allowed to close the road by their giving up their claim to the same, and the Vice-Chairman of the Municipality, Mr. J. E. B. Jeffery, thereupon recorded the following order :—"Application granted on condition that the applicant make at his own expense a road 10 feet wide, *round the south and west side of his garden*, so as to form a through communication between Distillery and Napitpara Lane.

J. E. B. JEFFERY,
31st Dec. 1874."

Although this order was dated the 31st December 1874, the zemindar made no attempt to close this road until the beginning of 1876, when he erected fences to bar the ingress and egress of the public.

Upon this the inhabitants of the neighbourhood presented through the local Commissioners a petition to the Municipal Commissioners of Serampore, complaining of the aforesaid alleged illegal and unjust order, and praying for redress, but the majority of the Commissioners in meeting assembled declined to interfere with the Vice-Chairman's order, under the impression that they had no power to do so.

The matter was then brought to the notice of the Magistrate of Hooghly, Sir William Herschel, who, under Act III. B. C. of 1864, also Chairman of the Serampore Municipality, and he, on the 2nd May 1876, in calling for a report from the Vice-Chairman, characterized the order of Mr. Jeffery as a bad order, as it gave a way for no consideration, and the order of the Municipality as bad, because it affirmed for

no other reason than that the thing was done, an illegal order of their Vice-Chairman.

Correspondence ensued, and subsequently the case was taken up under Section 521 of the Code of Criminal Procedure, by the present Joint Magistrate of Serampore, Mr. A. H. Haggard, who is also *ex-officio* Chairman of the Municipality, and the following is his judgment in the matter which formed the subject of the present appeal:—

" After taking evidence in this case, I cannot come to the conclusion that the obstruction made by Brojo Nath Dey was an unlawful one. I do not think that the Municipality, in permitting the closing of the road to Satgopepara Lane were acting *ultra vires*, or that the amount of inconvenience caused to the public by its order was so great as to render the act of the Municipality illegal, and by consequence, that of Brojo Nath Dey illegal. The *detour* that has to be made by persons going to the river does indeed appear to be very large. But measurement shows that it is not so large as I had thought, the *detour* varies in distance for each person's house. It appears that Ram Kumar Ghose, the person who was most excited on the subject, has actually only a *detour* of 17 feet to go, if he uses the back door of his house.

Brojo Nath made a fair offer to the Municipality of offering to make another road if he was allowed to stop this one. His offer was accepted, and he has fulfilled his part of the contract. I admit that I think he has got the best of the bargain, as he makes his garden a fine and valuable property at a cost of a few hundred rupees.

I think that the Serampore Municipality sold their birthright for a mess of pottage—for such a gift as they gave Brojo Nath Dey, they ought to have exacted an adequate price. But they failed to do so, and I cannot now interfere in the matter, unless their act was illegal, which I cannot hold it to have been. On the evidence, therefore, I cannot make my order of the 21st October absolute, and I hereby cancel it.

A. H. HAGGARD,

21st Dec. 1876.

Since the institution of this case *without complaint* certain petitions have been presented, praying me to open the road. The petitioners' mooktar should be informed of my order if they think either my order illegal or that of the Municipality, they should have resort to the High

Court, *in its Original Jurisdiction,* to set aside the order of the Serampore Municipality.

A. H. HAGGARD,

21st Dec. 1876.

Upon the case coming on for hearing in the High Court, it was ordered that notice be given to the Commissioners of the Serampore Municipality, in order that they might appear if they thought fit, and June 14th was fixed for the final disposal of the case.

On the case coming on for final disposal on the 14th June, the Junior Government Pleader stated that he had received a letter from the Chairman of the Serampore Municipality, in which he intimated that the Commissioners had decided not to appear.

Baboo Troilokynath Mittra observed that the present Vice-Chairman of the Municipality was sitting beside him, and that he believed he might safely state that a number of the Municipal Commissioners were strongly in favour of the road being opened.

The learned Pleader then placed before the Court the facts of the case as detailed above, and argued that the Vice-Chairman of the Municipality had no authority to close a road, and that therefore his order was *ultra vires,* and consequently illegal, and the closing of the road under these circumstances, by the Baboo, would of necessity therefore be illegal, and the obstruction an unlawful one within the meaning of Section 521 of the Criminal Procedure Code.

He then proceeded to read Sections 2, 10, 11, 13, 15, 16, 57 and 58 of the District Municipal Improvement Act of 1864, and pointed out that no power was given to the Commissioners to sell, divert, or close a road; it was true that Section 13 gave power to sell land not required for the purposes of the Act, but in the first place he would contend that the word land did not include a highway, and in the second place, that the sale of a road would not be for the purposes of the Act, which were expressly the repair and maintenance of roads.

The Court would observe that, though leave was expressly reserved to the Commissioners to grant permission, under Section 58 of the Act, to persons to make alterations in the fences, pavements or posts of a highway, Section 57 made the obstruction of a public highway an offence punishable with a fine of Rs. 100, and the Commissioners had no power reserved to them to sanction it.

The learned Pleader then drew attention to the Calcutta Municipal Act of 1863. and pointed out that Section 109 of that Act vesting the streets in the Justices, was precisely similar to Section 10 of the District Municipal Act vesting the Highways in the Commissioners; Section 110 of the Calcutta Act gave the Justices express power to divert and close up streets, and it must therefore be assumed that the Legislature considered that without that section the Justices had no such power. The District Municipal Act was passed after the Calcutta Act, and though Section 109 was repeated in the District Act, Section 110 was entirely, and no doubt designedly, omitted; it would therefore clearly seem to have been the intention of the Legislature that the Mofussil Municipal Commissioners should have no such power.

It might not now be out of place to refer to the English Acts on the subject of Highways. The principal Act was 5 and 6, Will. 4, c. 50; and Section 84 of that Act laid down a most stringent procedure to be adopted in case it was wished to divert or stop a road, the inhabitants in vestry assembled had first to consider whether it was expedient to close the way, two Justices had then to view the same, and if it appeared to them that the road might be diverted or turned, so as to make *it nearer or more commodious to the public*, the said Justices were to affix notices at the place and by the side of each end of the highway, and were also to insert the same in the newspapers for four successive weeks, and also to affix them on the door of the church for the same period; and there was a right of appeal reserved to the inhabitants affected.

The Court would observe that even there the road could only be diverted if it were *nearer or more commodious* to the public, but it was generally admitted in the present case that the stoppage of this road was *a positive inconvenience.*

At the common law of England, there can be no destruction of the public right; a highway must always continue to be a highway. The case of *Fowler* vs. *Sanders*, Cro. Jac. 446, fully proves that it cannot be narrowed, neither can it be enclosed. The people have no ability to consent to a relinquishment of any of their rights except by the agency of their representatives in Parliament.

The Statute 13, Geo. 3, c. 78, gave power to the Justices to widen and divert roads; this statute was amended by 55 Geo. 3, c. 68, which required public notice to be given, and gave a right of appeal; but the manner in which this power was exercised was often the subject of com-

plaint. See *Wellbeloved on Highways*, p. 371, and preface IX.; *Rex* vs. *Justices of Worcestershire*, 2 B. and Ald. 228; *Rex* vs. *Justices of Surrey* of D. and R., 857; *Rex* vs. *Homer*, 2 B. and Ald., 150.

It was doubted, before the passing of the Act of Will. IV., whether Justices could divert a road *partially*, so as to vary the line of road for carriages, but continue it for passengers. *Rex* vs. *Winter*, 8 B. and C., 785; 3 Man and R.

In *Reg.* vs. *United Kingdom Electric Telegraph Co.*, 9 Cox, Cr. Ca., 137, Martin B., held among other things that a permanent obstruction erected on a highway, and placed there without lawful authority, which renders the way less commodious than before to the public, is unlawful. So in *Reg.* vs. *Train*, 9 Cox Cr. Ca., 181, it was held that the withdrawal of a part of the public highway from the use of the public is a nuisance, and that the vestry had no power to grant such power. See Kinealy's Penal Code, and the notes to Section 431, page 254.

Turning again to the Calcutta Act of 1863, it had been held that under the 180th Section, the Justices of the Peace are required to keep up and maintain the existing tanks, reservoirs, &c., vested in them, or to substitute a new tank, reservoir, &c., for any existing tank, reservoir, &c.; *i. e.*, new works of a like kind, each for each, in place of the old. Therefore, when the Justices had closed a tank for the purpose of constructing in its place a different means of water-supply, a mandamus was issued by the High Court, directing the Justices to maintain the tank, and supply it with water, or to substitute another in its place, and supply that with water—(*Reg.* vs. *the Justices of Calcutta*, 2 Indian Jurist, N. S., 182)—Sections 12 and 15 of the District Municipal Act 1864 enacted that the Commissioners shall thenceforth repair and keep up the roads, streets, and drains, but no power of substitution was given.

He would therefore contend that the order of the Vice-Chairman, Mr. Jeffery, was bad in law, being unauthorized and illegal; that it had never been confirmed and ratified by the Commissioners at a meeting, and that even if it had, it was bad, because neither the Commissioners nor their Chairman had any authority to close, stop, or divert any public highway.

He might in conclusion mention that in the Mofussil Municipalities Act of 1876 a power was expressly reserved, in Section 213, to the Commissioners to close *temporarily* any road or part of a road for the purpose of repairs or for any public purpose. He would therefore argue

that the Legislature considered it necessary to give the power of closing roads *temporarily* by express enactment, and it would therefore seem that they considered that the Municipality would have no power to close a road even temporarily, unles it was expressly so enacted.

The learned Pleader then drew the Court's attention to Sections 189 and 190 of the Calcutta Municipal Act of 1876. It would be observed that Section 189 of this Act was almost identical with Section 32 of the Mofussil Act of 1876 but Section 190, which gave the Justices power, among other things, to turn, divert, discontinue or stop up any public street, was altogether omitted from the Mofussil Act, in the same manner as Section 110 of the old Calcutta Act had been omitted, as previously pointed out, from the District Improvement Act of 1864. There could therefore be no doubt that it had all along been the intention of the Legislature to limit the powers of the Mofussil Municipalities, and where we found such express provisions inserted in the Calcutta Act, we could not safely assume that the Mofussil Municipality had them by implication.

Babu Taraknath Dutt, on the other side, rested his argument entirely on Section 10, and contended that as the roads vested in the Commissioners, they had the power to sell them. He quoted no authorities in support of his argument.

Babu Troilokynath Mitter, in reply, said it was no doubt true that the road vested in the Commissoners, but Section 12 made them trustees for the purposes of the Act, and the purposes of the Act were expressly stated to be, among other things, the repair, keeping up and maintenance of the roads.

The Court took time to consider its judgment.

The following was the judgment of the Court:—

Markby, J.—The only facts in this case which appear to me to be of importance for the purpose of the present application are these:—

Within the town of Serampore there is a body of Municipal Commissioners appointed under Act III., B. C. of 1864. Within the limits subject to their jurisdiction, there was formerly a lane, called the Shudgoprah Lane, leading to the River Hooghly. This lane ran through the garden of Babu Brojonath Dey. In the year 1869 this lane was stopped up by persons acting on behalf of the Babu. These persons were convicted under the Indian Penal Code of obstructing a public highway. Proceedings were then taken in the Civil Court by the Babu with the

view of establishing that the road was not a public highway, but these proceedings were unsuccessful, and it is now admitted that the lane in question was a public highway. The litigation in the Civil Courts ended in January 1871. In August 1874 Babu Brojonath Dey presented a petition to the Municipal Commissioners of Serampore, which still contests the fact that the lane is a public highway, but nevertheless prays for permission to close it under such conditions as the Municipal Commissioners may consider reasonable. There is nothing to shew what proceedings by way of enquiry were made upon this application, but on the back of the petition there is written this order.

"Application granted on condition that the applicant make at his own expense a road 10 feet wide round the south and west side of his garden, so as to form a thorough communication between Distillery and Napitparah Lane." This order is signed.

(Sd.) J. E. B. JEFFERY,
31st Dec. 1874.

There is some doubt whether or no Mr. Jeffery added any word to shew the capacity in which he signed the order, but it is admitted that he was the Vice-Chairman of the Municipality, and it has been assumed in the present argument that this order was made by him in that capacity. It is not clearly shewn when this order was acted on, but the road was completely stopped at some time prior to January, 1876. The road to the south and west of the Babu's garden was also made as directed, but it would appear that there is some doubt whether this was really a new road, or whether it existed before and was only widened.

An attempt was then made by the inhabitants of the neighbourhood to induce the Municipal Commissioners to reconsider the order of Mr. Jeffery, but the Municipal Commissioners thought they were not competent to do so. This application was then made to the Magistrate of the district, who is ex-officio Chairman of the Municipality. The District Magistrate appears to have satisfied himself that the order of Mr. Jeffery was injurious to the inhabitants, and that it was made without consulting any of the other Commissioners, but nevertheless he ultimately thought he had no power to interfere. The matter was then taken up by the Joint Magistrate of Serampore who in October 1876 called upon Babu Brojonath Dey, under Section 521 of the Code of Criminal Procedure, to shew cause why the obstruction to the Shudgoparah Lane

should not be removed. The Joint Magistrate, however, also ultimately held that the order of Mr. Jeffery was not illegal, and he refused to proceed any further.

This last order is now before us under Section 297 of the Code of Criminal Procedure, and the question of law raised is whether the Joint-Magistrate was right in holding the order of Mr. Jeffery to be legal.

The question turns on the construction of Act III. (B. C.) of 1864, which was in force when the order of Mr. Jeffery was made. The powers and duties of the Municipal Commissioners are defined in Sections 6 to 23. No power to stop up or divert public highways is anywhere in express terms given by the Act, but public highways not being the property of Government or private property, are by Section 10 vested in the Municipal Commissioners. By Section 9 the Municipal Commissioners are enabled to sue and be sued in their corporate name, to hold properties, movable and immovable, and to convey the same, and to enter into all necessary contracts for the purposes of the Act. By Section 12, the Municipal Commissioners are required to apply all property vested in them for the purposes of the Act.

The argument is that Shadgoparah Lane was a public highway vested in the Municipal Commissioners, and that, under the Act, the Municipal Commissioners may dispose of their property in any way they please, provided they do so for the purposes of the Act, which purposes, it is further said, are defined in the preamble, namely, the " conservancy, improvement and watching" the district where they have jurisdiction. The Commissioners, therefore, it is argued had a right to stop up this road, if their doing so was for the improvement of the town, of which they are the sole Judges. I am of opinion, however, that it was not the intention of the Legislature to give by implication these very wide powers to the Municipal Commissioners. I read the provisions of those sections of the Act which define the powers and duties of the Commissioners quite differently. I think the general words of Sections 9, 10 and 12 are controlled by the specific provisions of Sections 13, 14, 15 and 16. In regard to highways, which are the property of the Municipal Commissioners, I think that the only powers which Municipal Commissioners have over them is to make, repair and keep properly cleansed such highways, and to do such things upon them as are necessary for conservancy (Section 15). If any more extensive works are necessary, then the consent of the Lieutenant-Governor must be taken (Section

16, and even with the consent of the Lieutenant-Governor there is no power to stop up a road. It seems to me that if the mere fact of property being vested in the Municipal Commissioners for the purposes of the Act gave them the extensive powers contended for, those sections which define the powers of the Municipal Commissioners over their property would be meaningless.

This construction of the Act appears to me to be most in accordance with what is reasonable and proper. By Section 20, the Chairman or Vice-Chairman may make any order authorised by the Act unless it be expressly required to be made at a public meeting, and therefore, if by the Act the Municipal Commissioners are authorized to make an order for the stopping up of a public highway, it would be very difficult to say that that order might not be made by the Chairman or Vice-Chairman acting alone, and the order in the present case was in fact made by the Vice-Chairman upon his sole responsibility. It is most improbable that the Legislature intended to confer such extraordinary powers upon a single individual.

The construction which I have put upon Act III. (B.C.) of 1864 is further confirmed by a comparison of its provisions with those of Act VI. (B.C.) of 1863, relating to the town of Calcutta, upon which the Act of 1864 was obviously modelled; Section 109 of Act VI. of 1863 vests the streets of Calcutta in the Justices almost in the same words as Section 10 of Act III. of 1864 vests public highways in the Municipal Commissioners. But by Section 110 of the former Act express power is given to the Justices with the sanction of the Bengal Government, "to turn, direct, discontinue or stop up any public street." This, I think, shews that merely vesting highways in a Municipality does not *ipso facto* empower the Municipal body to stop them up, if they happen to consider that to do so is advantageous for the town. I may also observe that to hold that the Municipal Commissioners derive a power to stop up highways from the circumstance that certain highways of the town are vested in them would lead to this, that highways not vested in them could not be stopped up. This distinction would be reasonable enough as regards highways vested in Government, but quite unreasonable as regards highways which are the property of private individuals.

I therefore consider that this order of Mr. Jeffery permitting Babu Brojonath Dey, upon certain conditions, to stop up this lane was an order which neither he as Vice-Chairman, nor the Municipal Commissioners,

had power to make, and that the order of the Joint Magistrate of 21st December 1876 holding Mr. Jeffery's order to be legal was wrong in law, and ought to be set aside. The record of the proceedings against Brojonath Dey, under Section 521, will be returned to the Joint Magistrate, and he will finally dispose of those proceedings by such order as he thinks proper, treating Mr. Jeffery's order for the purpose of these proceedings as a nullity.

I am very glad to have arrived at a result which will probably have the effect of restoring to the inhabitants of the neighbourhood the use of the road of which they appear to me to have been very improperly deprived. I quite agree with the condemnation passed by the Magistrate and present Joint Magistrate upon Mr. Jeffery's order, by which the interests of the public seem to have been sacrificed to those of a single individual.

PRINSEP, J., concurred.

PRIVY COUNCIL.

The 12th June, 1877.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier.

(On Appeal from Judicial Commissioner's Court, Central Provinces.)

RAJAH PARICHAT (Defendant) *Appellant,*

versus

ZALIM SINGH (Plaintiff) *Respondent.*

Special Appeal—Maintenance—Illegitimate son—Assignment of land—Mitakshara—Son unborn at the time of the Assignment.

Where the plaintiff sued for possession of an estate but the lower courts instead of awarding him possession made a decree in his favor for receiving maintenance out of the estate and he acquiesced in that decree, and subsequently in special appeal by the defendant the decrees of the lower courts were reversed by the Judicial Commissioner and a decree for possession granted to plaintiff, *held* that the Judicial Commissioner was competent to make such a decree.

It appearing to their Lordships of the Judicial Committee of the Privy Council to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes has a right of maintenance, it was *held* that in assigning maintenance to his illegitimate son, his father was acting in the performance of a legal obligation, and that a grant of property made by him out of his ancestral estate for the maintenance of his illegitimate son is not invalid.

The following is a statement of the facts connected with this case:—The late Rajah Bahadoor Singh, while he had no legitimate son born,

granted to the plaintiff his illegitimate son, a portion of his ancestral property, for his maintenance. The Rajah subsequently had his legitimate son, the defendant born. After the death of the Rajah, the plaintiff was dispossessed and he sued for possession of the estate granted to him by the Rajah. The lower Courts instead of awarding him possession made a decree in his favor for receiving the net profits of the estate after deducting the expenses of its management. On special appeal by the defendant, the Judicial Commissioner reversed the decrees of the lower Courts and made a decree granting possession of the estate sued for, to the plaintiff. The defendant having appealed to the Privy Council against that judgment, their Lordships of the Judicial Committee, after reciting the above facts delivered the following :—

JUDGMENT.—It has been argued, that to make this decree upon a special appeal was *extra vires* of the Judicial Commissioner, the Courts below having decided against the Plaintiff's claim to possession, and he having acquiesced in their decisions. It seems, however, to their Lordships, that the Appellant himself re-opened that question. He took the cause before the Judicial Commissioner. By his fifth ground of appeal he contended that the particular decree which had been made was improperly made ; by his first ground of appeal he contended that the suit ought to have been dismissed. If he were right on the former point, but wrong upon the latter, it became necessary for the Judicial Commissioner to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him.

A more substantial question is that raised by the first ground of appeal. Their Lordships do not think it necessary in this case to determine the question, whether, under the Mitacshara law, a father who has no child born to him is or is not competent to alienate the whole or part of the ancestral estate ; whether the rights of unborn children are so preserved by the Mitacshara as to render such an alienation unlawful. When that question does come distinctly before them, it will of course be their duty to decide it ; but upon the present appeal they abstain from laying down any positive rule one way or the other. It seems to them that the objection in this case goes only to the particular alienation by the sunnud, which stands upon a different footing. It appears to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes, and the Rajah may be assumed to fall

within that category, has a right of maintenance. Therefore, in assigning maintenance to Zalim Singh, his father was acting in the performance of a legal obligation. He could not consult his legitimate son, because at that time there was no legitimate son born, and therefore looking to the purpose for which the grant made by the sunnud, whatever may be its extent, was made, their Lordships think that it would not fall within the prohibition, supposing, which they are far from deciding, that a father, having no legitimate son, is by the Mitacshara law incompetent to alienate ancestral estate to a stranger. Their Lordships therefore, without, as has been said before, determining anything as to the extent of the grant, are of opinion that upon the question whether the Rajah Bahadoor had power to make it, the concurrent decisions of the three Courts in India were correct; and on the whole case they are of opinion that the decree of the Judicial Commissioner is right, and ought to be affirmed; and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal. There will be no costs, as the Respondent has not appeared.

DIFFERENT KINDS OF MORTGAGES.*

In the present course of lectures I shall adhere to the classification of securities which we found in the Roman law. Following that classification, I propose in this lecture to make a few general observations upon the various kinds of conventional mortgages in use in India at the present day. From what I have already said, you must have seen that a creditor possessing a security may have either a right to sell the property mortgaged to him, or he may become the absolute owner of the property, on default of the mortgagor to repay the money lent to him. In the first case, the creditor is not entitled to anything in excess of the debt and costs. In the second case, the creditor becomes entitled to the property, whatever may be its value. In either case, however, the creditor is wholly independent of the debtor. There is, however, another way in which property may be given as a security, and that is by letting the creditor into possession, and permitting him to repay himself out of the rents and profits. Thus, we have three different kinds of securities all of which are to be found in India. The first is called a simple mort-

* *Vide* Tagore Law Lectures, 1875-6. Lecture III. by R. R. Ghose, Tagore Law Lecturer.

gage; the second, a conditional sale; and the third, a usufructuary mortgage. It is true they may be sometimes found in combination, which gives rise to a greater variety; but the three I have mentioned are what I may call the primary divisions of Indian mortgages. There are in some parts of India particular descriptions of mortgages peculiar to those provinces, as the *Otti* of Madras and the *Gahun lahen* of Bombay; but they do not possess much general interest, and one of them, the *Gahun lahen*, in its incidents, closely resembles the conditional sale of Bengal and the North-Western Provinces. I shall discuss the various rights and liabilities created by each of these kinds of mortgages in succeeding lectures. In the present lecture I shall state the different ways in which conventional mortgages may be created, and the formalities which it is necessary to observe, ending with a few general observations on this class of securities. Neither the Hindu nor the Mahomedan law requires writing for the validity of any transaction, however solemn. "Contracts of every description, involving both corporal and spiritual consequences, may be made orally." (Per Holloway, J., 2 Mad., 37.) It is true that writing is often enjoined, particularly by Hindu lawyers, and preference, as we have seen, is sometimes given to a transaction evidenced by writing over a parol contract or transfer. But the fact remains that in no instance is writing absolutely necessary by law. Among Englishmen, however, who can only convey by deed, a parol mortgage is invalid at law. We shall, however, presently see that the strict rule of law has been broken in upon by the introduction of a class of securities, known as equitable mortgages, so called because they are only recognised by the Court of Chancery. Among Hindus and Mahomedans, however, a parol mortgage is as good as a mortgage reduced to writing. This rule of Hindu and Mahomedan law has been left untouched by the Legislature, notwithstanding the introduction of a very stringent system of registration. In practice, however, mortgages are almost invariably reduced to writing; and the language of the earlier Regulations shows that the practice is by no means a recent growth. In conditional sales, however, parol defeasances are not uncommon, although in recent years, they have become much less frequent than before. It must not, however, be understood that a verbal mortgage stands precisely in the same situation as a written mortgage which has been registered. The Indian Registration Acts, although they do not insist upon the necessity of a written instrument, when the laws of

the country do not require that the transaction should be evidenced by writing, give as a rule preference to registered instruments over parol agreements or declarations. Section 48 of Act VIII. of 1871, the present Registration Act, says,—"All documents, not testamentary, duly registered under this Act, and relating to any property whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession."

The section is not very happily worded, and the meaning of the words "agreement" and "declaration" has given rise to some discussion. There can be no doubt, however, as explained by Mr. Justice Markby in *Salim Sheik* against *Bydanath Ghuttuk*, that the word "agreement" in the Act is not intended to be used in the sense of what English lawyers call an executory agreement. It evidently embraces conveyances as well as contracts. It seems to me, however, that the language is not very happily chosen, and plausible arguments may be urged in support of a different view. (12 W. R., p. 217.)

While upon this subject a few words upon the real nature of a conventional mortgage may perhaps not be thrown away. A mortgage may be viewed in two different aspects. It is a contract creating a personal right so far as the promise of the debtor to repay the loan is concerned. But it is also a conveyance in so far as it passes to the creditor a real right in the property, which is charged with the repayment of the money. Now a real right, as I have already explained to you, is never conferred by a contract; but a mortgage is looked upon so much as a contract that it is precisely one of those transactions in which we are most likely to confound a contract with a conveyance. I shall show hereafter the importance of this distinction which seems to have been overlooked in some of the cases in the books.

Before dismissing the subject of registration, I wish to make one observation. You find that a parol mortgage is protected, only when it has been followed or accompanied by possession; and the reason is because the actual delivery of possession gives publicity to the transaction, and thus lessens the chances of fraud. It is upon this ground that the Court has refused to extend the protection to a case in which a merely constructive possession is delivered to a person already in actual possession either as tenant or under some other title. (*Kirtee Chunder Haldar* v. *Raj Chunder Haldar*, 22 W. R., p. 273.)

SHORT NOTES.

PRIVY COUNCIL.

Hindu widow—Undivided family—Authority to adopt.

According to the law prevalent in the Dravida country, a Hindu widow, without having her husband's express permission, may, if duly authorized by his kindred, adopt a son to him.

The Collector of Madura v. *Moottoo Ramalinga Sathupathy* (12, Moore's I. A. 397) referred to and approved.

Semble, in the case of an undivided family the requisite authority to adopt must be sought within that family, and cannot be given by a single separated and remote kinsman.

Speculations founded on the assumption that the law of adoption now prevalent in Madras is a substitute for the old and obsolete practice of raising up seed to a husband by actual procreation are inadmissible as a ground of judicial decision.

* *Vide* I. L. R., 1, Mad. Series p. 69. (Appeal from Madras High Court) 1876, January 11th to 15th and 25th, March 24th—Sri Virada Pratapa Raghunada Deo *vs.* Sri Brozo Kishoro Patta Deo.

Registration Act (*VIII. of* 1871), *s.* 76—*District Court—Order refusing Registration—Proceeding to compel Registration—Review—Act XXIII. of* 1861, *s.* 38—*Act VIII. of* 1859, *s.* 376.

The Registration Act of 1871 gives power to the Government to appoint Districts and Sub-Districts for the purposes of registration ; but the " District Courts" mentioned in the Act (except where the High Court when exercising its local jurisdiction is said to be a District Court within the meaning of the Act) must, in the case of a regulation province, be taken to import the ordinary Zilla Courts.

Semble.—The final words of the 76th section of the Registration Act, which declare that " no appeal lies from any order made under this section," apply to an order rejecting, as well as to an order admitting, an application for registration.

Quære.—Whether after an order has been made under s. 76 of the Act rejecting an application for registration, it is open to the parties benefited by a deed to propound it in, and to obtain its registration by means of, a regular suit? *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (9, B. L. R., 433) referred to and distinguished.

An order rejecting an application for registration, under s. 76 of the Registration Act of 1871, being, in respect of the Court pronouncing it, a final order of adjudication between the parties, is so far in the nature of a 'decree' within the meaning of Act VIII. of 1859, as to fall within the operation of the sections of that Act which provide for the admission of a review.

S. 38, Act XXIII. *of 1861, which enacts that "the procedure, prescribed by Act VIII. of 1859, shall be followed as far as it can be in all miscellaneous cases and proceedings which, after the passing of the Act, shall be instituted in any Court," renders the whole procedure of Act VIII. of 1859 including the power of admitting a review, applicable to a proceeding to compel registration under the Registration Act.

It may be competent to a Judge to entertain an application for a review, although such application contains no distinct allegation of an error in law in the order sought to be reviewed, nor any suggestion of the discovery of new evidence.

* *Vide* I. L. R., 2, Cal. Series, p. 131, (Appeal from Calcutta High Court) the 24th May 1876—Hadjee Abdoollah—*Petitioner;* and Reasut Hossein, *vs.* Hadjee Abdoollah and another.

Hindu Law—Adoption in the Dravida country—Widow's power to adopt with consent of Sapindas—Motives for making an adoption.

According to the Hindu Law, a widow who has received from her deceased husband an express power to adopt a son in the event of his natural born son dying under age and unmarried, may on the happening of that event make a valid adoption.

Bhoobun Moyee Debia v. *Ram Kishore Acharj Chowdry* (10. Moore's I. A., 279) *distinguished.*

Under the law which prevails in the Dravida country, a widow without any permission from her husband may if duly authorized by his kinmen adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband.

The observations of the Judicial Committee in the *Ramnad case* (12, Moore's I. A., 397) to the effect "that there should be such evidence of the assent of kinsmen as suffices to show that the act [of adoption] is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive," considered and explained.

* *Vide* I. L. R., 1, Mad. p. 174, (Appeal from Madras High Court) The 3rd November 1876—Vellanki Venkata Krishna Rao *vs.* Venkata Rama Lakshmi and two others.

British territory in India, Power to cede—Proof of cession—Transfer of jurisdiction—Re-arrangement of jurisdiction within British territory —Statutes 3 and 4 Will. IV., Cap. 85, Section 43; 24 and 25 Vic., Cap. 67, Section 22; and 24 and 25 Vic., Cap. 104, Section 9—The Indian Evidence Act of 1872, Section 113—Territorial jurisdiction of British Court ceases on cession.

Semble that the general and abstract doctrine laid down by the High Court at Bombay that it is beyond the power of the British Crown, without the consent of the Imperial Parliament, to make a cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power, is erroneous.

Where an objection is taken to the territorial jurisdiction of a British Court, on the ground that the territory over which the jurisdiction of the Court extended has been ceded to a foreign power, such a cession must be regularly proved and cannot be established by uncertain inferences from equivocal acts.

An agreement on the part of the Government of India purporting to transfer certain villages forming part of a Regulation Province within the Bombay Presidency, and subject to ordinary British jurisdiction, to the extraordinary jurisdiction of the Political Agency of a Native State, does not constitute a cession of territory.

A re-arrangement of jurisdiction within British territory in India by the exclusion of a certain district from the Regulations and Codes there in force, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a Native jurisdiction under British supervision and control, cannot be carried out except by legislation under the provisions of the Imperial Statutes 3 and 4 Will. IV., Cap. 85, Section 43, 24 and 25 Vic., Cap. 67, Section 22, and 24 and 25 Vic., Cap. 104, Section 9.

The Governor-General in Council being precluded by the Act 24 and 25 Vic., Cap. 67, Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in India, or as to the allegiance of British subjects, cannot by any legislative Act (*e. g.* by "The Evidence Act of 1872," Section 113) purporting to make a notification in the *Government Gazette* conclusive evidence of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession.

Where the foundation of the jurisdiction of a British Court over the subject matter of a suit and the parties thereto is territorial, and the territory by a valid cession ceases to be British, the jurisdiction of the Court can no longer be exercised, whatever be the stage or condition of the litigation at the time of such cession.

* *Vide* I. L. R., 2, Bom. Series, p. 367 (Appeal from Bombay High Court) the 13th, 15th, and 20th July 1875 and 16th February and 28th March 1876—Damodar Gordhan *vs.* Deoram Kanji.

THE

LEGAL COMPANION.

APPENDIX.

Speeches of the Members of the Council of the Governor-General of India regarding the passing of the New Civil Procedure Act.

GOVERNMENT OF INDIA.

ABSTRACT OF THE PROCEEDINGS OF THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA, ASSEMBLED FOR THE PURPOSE OF MAKING LAWS AND REGULATIONS UNDER THE PROVISIONS OF THE ACT OF PARLIAMENT 24 & 25 VIC., CAP. 67.

The Council met at Government House on Wednesday, the 28th March 1877.

PRESENT:

His Excellency the Viceroy and Governor General of India, G.M.S.I., *presiding*.

His Honour the Lieutenant-Governor of Bengal.
The Hon'ble Sir Arthur Hobhouse, Q.C., K.C.S.I.
The Hon'ble Sir E. C. Bayley, K.C.S.I.
The Hon'ble Sir A. J. Arbuthnot, K.C.S.I.
Colonel the Hon'ble Sir Andrew Clarke, R.E. K.C.M.G., C.B.
The Hon'ble Sir J. Strachey, K.C.S.I.
Major-General the Hon'ble Sir E. B. Johnson, K.C.B.
The Hon'ble T. C. Hope, C.S.I.
The Hon'ble D. Cowie.
The Hon'ble Maharaja Narendra Krishna.
The Hon'ble J. R. Bullen Smith, C.S.I.
The Hon'ble F. R. Cockerell.
The Hon'ble B. W. Colvin.
The Hon'ble Maharaja Jotindra Mohan Tagore.

The Hon'ble Sir Arthur Hobhouse moved that the Reports of the Select Committee on the Bill to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature be taken into consideration. He said :—" this motion is not one to pass the Bill before the Council into law, but it is intended to lead up to that final step, and I should like to add something to the reasons which I assigned a fortnight ago why that final step should now be taken, because, unless it is now taken, the labour of the Council in traveling into the consideration of these reports may prove to be premature, and may be to a considerable extent thrown away.

" I have seen some appeals publicly made to me of late days not to allow any desire I may feel to connect my name with the passing of this measure to influence me in trying to pass it. These appeals have not been made in any rude or disrespectful spirit; on the contrary, they have been made in terms that are only too complimentary to me; but there are one or two observations to be made upon them. In the first place, the man who built his house upon the sand would be a wise man compared to myself if I were to hope for any immortality because I happened to be the Law Member of Council at the time when this Bill was passed into law. We hope that this Code will be an improvement on the Code of 1859. But it is not nearly so great or difficult a work as the Code of 1859, because it is not nearly so original a work. Yet who connects the names of the authors of the Code of 1859 with that Code? It is true that men like Sir Barnes Peacock, Sir James Colville, or Sir Henry Harington have a lasting reputation, but that is because they have uniformly distinguished themselves throughout their lives, and not on the particular account of the Code of 1859.

" But even if I were vain enough to indulge in aspirations such as—

Forsitan et nostrum nomen miscebitur istis

or to sing,

Non omnis moriar, multaque pars mei
vitabit Libitinam

—if I were vain enough to indulge in any such sentiments as these, I am not going to be unjust enough to put myself in the place of those who have performed the solid part of this work. My Lord, the man who has done the greater part of this work from the time of the re-arrangement of the Code in 1875 up to the final correction

of the proofs, is Mr. Stokes. The man who has borne the second part in the labour is our colleague, Mr. Cockerell, who has brought to it all his great experience and ability and his untiring industry. In fact it is my belief that Mr. Cockerell knows this bundle of papers by heart; for when I want to know where anything is to be found, I do not trouble myself to hunt about the table of contents for it, but I ask him, and he immediately tells me. Moreover there is the original draft by Sir Henry Harington on which this Bill is founded, and there is the great number of able and industrious gentlemen outside this Council, to whose labours a large portion of the Bill is due—men like Sir Richard Garth, Mr. Justice Turner, Mr. Justice Ainslie, Mr. Field, and others whom time would fail me to mention. In fact if there ever was a law framed by the concurrence of a number of skilled hands, this is such a law; and if I were to appropriate it to myself because I happen to be the spokesman in Council, I should be an impostor, and some condign punishment would infallibly overtake me.

"I think that in this Council I need not disclaim any personal motive, but I wish to show how in point of fact there can be no personal motive for my pressing on the passing of this Bill.

"The only reason for the postponement of the Bill is, that it has been so short a time before the public. I dealt with that matter before, but I should like to read to the Council a letter which I received within the last two or three days from Mr. Justice Turner of the Allahabad High Court. He is one of the most able and uncompromising opponents of a certain portion of our Bill; and he is also one of those who have come forward and have assisted us most materially in framing that same Bill. He writes thus :—

"'Although as you are aware I was strongly opposed to some of the provisions of the Procedure Code Bill, No. IV, and although I fear I shall remain unconvinced of the desirability of some few of the modified provisions which remain in the Bill you propose to pass, I have no hesitation in asserting it will be a public misfortune if the passing of the Bill is delayed.

"'It cannot be said that the proposals embodied in the Bill have not been before the public for a sufficient time to enable all those who would be likely to criticize them to submit their opinions.

"'I have no reason to expect that within any reasonable period the constitution of the Legislative Council will be so altered, or the opinion of executive officers so much changed, as to promise a more favourable consideration of the objections I still entertain to some few sections.

"'On the other hand, should those sections of the Bill be disallowed by the Secretary of State, the symmetry of the measure would be undisturbed, and the valuable additions it makes to our rules of procedure would be immediately secured.

"'Moreover it is, as I understand it, the chief recommendation of a Code that any defects which escape notice in its enactment, or any provisions which may be found to operate unadvisably, may be immediately corrected by legislation.

"'For these reasons, if you think my opinion as an opponent of a few of the provisions of the Bill of any weight, I have felt bound to put you in possession of it.'

"Now I do think his opinion of weight, because no man outside this Council has more carefully studied our work than Mr. Turner, and no man is in a position which better enables him to judge what good it is likely to effect in the general business of the Courts of Law.

"The plain fact is, that a change of officers who have the conduct of a great measure like this does lead to disturbance of the work, and to waste of power. We all have our parts to play—Mr. Cockerell has one part, Mr. Stokes another part, and I a third part. If I go away Mr. Stokes must play my part, and his successor must play his. That would infallibly result in the unsettlement of portions of the work, and the necessity of doing a good deal of it over again. If therefore the matter is in substance ripe for final discussion, it is worth while to strain a point to bring on that discussion before a change takes place. I am afraid that some inconvenience has been caused to members of Council owing to the last print of the Bill being placed in their hands so late. But as regards the substantial questions of controversy which are embodied in this Bill, it seems to me that the time has come when they are quite ripe for final discussion; and therefore I hope the Council will not object to bring on that discussion now and finish it.

"Now I will pass to the more direct subject of my motion. There are three reports before the Council to consider. You are aware that this Bill was published in the year 1864. That publication brought in a great quantity of valuable comment, which resulted in the alteration of the Bill, and the republication of it in the year 1865 in the shape in which it was intended that it should pass. However the work was suspended, and it was not resumed until the year 1873. We then found that owing to changes in the law and other circumstances, it was necessary to alter the draft of 1865 to such an extent that it was convenient to recast it altogether.

Accordingly we did that, and we published it in a remodelled form, being that Bill which is labelled Bill No. III. That re-publication was accompanied by a report which is the first report before the Council. Our re-publication brought us in a very large amount of most valuable and laborious comment from a number of skilled persons, which resulted in numerous alterations set forth in our Bill No. IV. No. IV was published in September 1876, and was accompanied by a report which is the second report before the Council. Again we have had a great number of comments; not so many as before, but some of very great value; and again we have made a number of alterations; not nearly so many as before, but such as necessitated the reprinting of the Bill. The reprinted Bill is the Bill on the table and is numbered V. It is accompanied by a final report, which is the third report before the Council.

"The various papers have been placed in the hands of Hon'ble Members from time to time as they have been printed. They have not been placed on the table; and indeed if they were on the table, I should be speaking from behind a sort of breast-work of papers, and all my colleagues would be equally well protected; but they are in the hands of Hon'ble Members to use as they think fit.

"The substance of the two earlier reports has been explained to the Council, and I think I need not refer to it except so far as it may be in controversy at the present moment. Neither need I refer to the great quantity of detailed matter which we have touched from time to time. I shall confine this opening to the two subjects which have attracted general attention since the publication of Bill No. IV.

"The first of these subjects is the distribution of business between District Courts and Subordinate Courts. In Bill No. IV we proposed an alteration of the law for the purpose of confining to District Courts certain kinds of business now performed by Subordinate Courts. My hon'ble friend Mr. Cockerell explained the reasons for that proposal, and no doubt there was and is a good deal of reason and also a good deal of authority, as incidentally I shall have occasion to show, for the change proposed. But there came to the Committee so much evidence of the practical inconvenience likely to be caused by the change, that it seemed to them or the majority of them to preponderate, and it was thought wiser to leave matters as they now stand.

"There is a notice of motion on the paper in the name of my hon'ble friend Maharaja Jotindra Mohun Tagore. It is the third notice which stands in his name, and touches the relations of District Courts and Subordinate Courts. But it does not touch the general principles on which the changes were made by Bill No. IV, and I shall say nothing more about it at the present moment.

"The second subject of controversy relates to those parts of the Code which regulate the execution of decrees for money-debts. When I addressed the Council in September last, I stated that our Code was found to work in a harsh and rigid way against the debtor, so as to drive men to despair, and to create much suffering and even danger. I said that having proposed to soften the law in this respect by our Bill No. III, we had on the evidence and advice sent in to us proposed to go further in the same direction and soften it still further by Bill No. IV. I mentioned various points in which we proposed alterations for that purpose. The principal of these were imprisonment for debt, the sale of land, and the exemption of property from execution at the instance of the creditor. Now in proposing these alterations we had regard to what was told us of the state of various parts of the country, which warned us that a very rapid transfer of land from the hands of one class to the hands of another class, or too great harshness and rigour in the prosecution of decrees against debtors, produced great misery and disorder, and even in some parts of the country danger. So far then, although it is confined to its own proper province of procedure, our Bill is connected, as other legal operations are connected, with a great political question. I thought we had given to the State somewhat more power than the present Code gave to it to guide the course of a decree, though I think now that in that opinion I was mistaken. But still I thought that substantially we aimed at the same objects with our predecessors who framed the Code of 1859, and that we kept their main lines intact. Speaking in Council I summed up the alterations thus:—

"'These provisions relating to execution-sales constitute the principal alteration that we propose in the Code, and our object has been to alleviate the harshness and rigidity of the law, to diminish the number of forced sales, and to get for the owner of the land something like an adequate value for it, at the same time keeping clearly in mind the important principle—one of the most important objects of all civilized society—that a man should perform his contracts and pay his debts to the best of his ability.'

"Such being my view of our proposals, what was my surprise when I found that the publication of the Bill brought us in lectures on political economy, or what calls itself such, and charges that we were confiscating property, disturbing the money-market, re-enacting usury laws, reverting to a patriarchal system of government, undergoing violent oscillations of policy which was known only to the minds of Indian officials, disregarding the wisdom of ages, and making laws at variance with human nature. Indeed such a storm of expostulation arose that I was quite frightened, until the happy thought occurred to me of looking to see what the existing law actually is, and what were the alterations we proposed. Then I was comforted, for with one dubious exception which I will explain presently, I found that we had proposed no more than what I had stated to the Council. In fact we had proposed something less. For being driven by stress of weather to examine the motives of the Code of 1859, I satisfied myself that not only did we aim at precisely the same objects with the framers of that Code, but that we had in contemplation precisely the same mothods as they had. In fact the head and front of our offending is this, that we show an intention on the part of the legislature that the powers existing in the law, but now lying unused, shall be used, and for that purpose we proposed to commit them to hands more likely to use them.

"It will be convenient if at this point I explain to the Council what are the provisions that are so much complained of, and what they do, and what they do not, effect. They will be found in the sections of Bill No. V which are numbered 320 to 325. I omit section 326, because it is only a repetition of what is in the existing Code, and I do not for the present speak of section 327, because it turns upon some considerations which are peculiar to itself.

"In the first place these sections do not of their own force work any alterations either in law or practice, for they are only to be brought into action when and where the Executive Government thinks fit.

"In the second place they do not interfere with any specific contracts affecting land, such as a mortgage. If, for instance, land is to be sold in pursuance of a mortgage, the only powers the Collector will have over the sale are those powers which a prudent vendor by auction commonly exercises—the power of lotting the property, of adjourning the sale, of fixing a reserved bid, and of buy-

ing in. But in connection with this point, I should say that, owing to some inadvertence in the drawing of the Bill No. IV, it might have been considered that the whole of these sections applied to mortgages as well as to unsecured money-debts. It was obvious indeed from the context, and also from what I said in Council, that they were not intended so to apply; and in his comments, Mr. Justice Turner has treated this defect as an obvious slip, and with his invariable fairness has taken no advantage of it in his argument. But I mention the matter now because it may possibly account for what seems to me the very exaggerated views of our operations entertained by various of our critics.

"So much for what the sections do not effect. Now for what they do.

"Section 320 enables the Executive to declare that in any place and with regard to any class of decrees for the sale of land, the execution of the decree shall be committed to the hands of the Collector.

"Section 321 gives to the Collector the ordinary powers of vendors at auction-sales.

"Section 322 gives him further powers in cases only of money-decrees, namely, powers of arrangement between debtors and creditors. It provides that if he sees reason to believe that the judgment-debt of the debtor can be discharged without the sale of the whole of the property, he may raise the amount necessary to discharge the debt, with interest according to the decree if the decree specifies the rate of interest, and according to his discretion if the deeree does not specify the rate of interest, by sale, by mortgage, by letting or my taking the property under his own management. The Council will observe, that in sub-section (*b*), which gives powers to let on farm or to manage, it is provided that these powers shall be exercised only with the decree-holder's consent. That is a restriction which did not exist in Bill No. IV, but was introduced by the Committee in Bill No. V, and my hon'ble friend Sir Edward Bayley has a motion on the paper for the purpose of restoring the provisions of Bill No. IV, in that respect.

"Section 323 requires the Collector to ascertain the other judgment-debts of the debtor, and it protects the property against alienation while in the hands of the Collector, just as the existing

Code protects the property against alienation while in the hands of the Court.

"Section 324 provides that if the arrangements made by the Collector do not succeed in paying the debt, the property shall be sold after all.

"Section 325 makes the Collector accountable to the Court for all his receipts, and it directs the distribution of the proceeds in payment of the debts.

"I should have thought that these proposals were moderate and reasonable enough, but they certainly do not appear so to some people, because they have been severely observed in several quarters. I will read to the Council what Mr. Justice Turner says about them. I select him, not because he stands alone, but because he puts with much force what he has to say. He has sent in to the Committee a Minute on Bill No. IV, which I can recommend as good reading to those of the Council who have not read it, in which he first enters into some general arguments directed against patriarchal government. Possibly those general strictures might have been modified in view of the alterations made since Bill No. IV was published, but those alterations have not prevented a hostile motion, and I have to meet the whole line of argument on which that is grounded. In the course of these arguments he makes the following observations:—

"'In India however there exists, I will not say a school of political thought, but a numerous body of gentlemen, who declare that the experience of centuries should be disregarded, and that the rules of political and economical science which the wisdom of Western philosophy has deduced from the motives ordinarily influencing mankind, are wholly inapplicable to Eastern nations.'

"Then when he comes to these particular clauses he says:—

"'The first objection which I have to offer to these sections, in common with section 326, is, that the Legislature is called upon to delegate its functions to an authority so eminent as to be almost above the reach of criticism. It is asked to empower the Executive Government, by purely arbitrary acts which will have *ex post facto* operation, to disturb the securities on which millions of rupees are invested, and to deprive persons who have money-claims against the owners of lands of the fund to which they are entitled to have recourse, and which, in the case of money lent, was the basis of the debtor's credit.'

"Now pausing here for a moment to explain, the Council will notice that section 326 of Bill No. IV, which Mr. Turner mentions, is section 327 of our Bill, to which I have said that different consi-

derations apply. Nor does he mix up the two together. But all his observations, as the Council will observe from what I have said, apply both to the earlier sections, 320 to 325, and apply again to 327. He is also speaking of general money-debts, which he alleges to be contracted with an eye to the land, and not of debts secured by mortgage.

"Then he continues :—

"'Such acts amount to confiscation. Nothing can justify them but the gravest political necessity, and at present no such necessity exists or is imminent. I urge then that legislation should be postponed until the necessity arises which justifies the creation of this power.

"'The oscillation of official opinion, owing to the constant changes of the *personnel* of the Government and the absence of party traditions, is so great, that economical heresies are never killed, but revive at least once in a decade of years. Although I believe no one who pretends to statesmanship would at the present moment exercise powers of which the iniquity is apparent, and which are justifiable only in extreme emergencies, when the tide of official opinion turns, pressure may be brought on the Executive to avail itself of powers which it has ready at hand, and which, were time allowed for public discussion, it would not create.'

"Well now that is a good, honest, outspoken statement of the faith that is in a man, and such as one likes to see; and I think that we ought to be very much obliged to any gentleman who, with no motive whatever but the public interest, takes the trouble to put what he believes to be the truth into such very frank and clear language. At the same time it seems to me that the remarks are misdirected when they are applied to the provisions I have explained to the Council. I say the same of other similar arguments, and the Council will understand me to be addressing myself to the whole line of attack represented by the motion of my hon'ble friend the Maharaja Jotindra Mohan Tagore.

"Inasmuch as I contend that we are only proceeding cautiously on lines already laid down, the Council will hardly expect me to take much time in combating arguments which, whatever their abstract value may be, are pitched so high as entirely to miss the mark. But before I go on to show how they miss the mark, I will try to show what seem to me to be the broad differences of opinion between the opposing parties.

"I may be wrong, and I hardly suppose that our opponents will accept my view of what is necessary to make their position a sound one, but it seems to me that they cannot support their objections

without first making good two propositions. The first of these is, that when a man has made a contract with another man, he is entitled to call upon the supreme forces of Society to step in and enforce his contract in every jot and title, and that without allowing to Society any moderating influence over the contract, unless perhaps it can be shown to be grounded in fraud. The second proposition is, that a contract by A to pay B a hundred rupees is a contract by A to strip himself of every shred of property that he possesses in order to make good that hundred rupees.

"Now both these propositions seem to me exaggerations of principles which, if stated with their due qualifications, most people will be ready to accept. Of the first proposition I should say, that it is a most sound and important principle that people should be held to the substantial performance of their contracts. But I should add that if the rigid and extreme performance of contracts is found to produce misery and disorder, then Society, which is called in to enforce these contracts, should exercise some moderating influence over them, and that such a duty is the more imperative in proportion to the helplessness of the debtor-class. Of the second proposition I should say, that a contract to pay a sum of money seems to me quite a different thing from a contract that the borrower shall strip himself of all the property that he has for the support of himself and his family in order to pay that money. It may be argued that, in order to enforce a contract to pay money, it is the duty of Society to step in and strip the borrower naked. But I do not see how it is even arguable that if such a process takes place, the creditor does not get something outside the terms of his contract. If he does, terms may be reasonably imposed upon him in return, such as are found necessary for the peace and welfare of Society.

"How far Society should step in and insist upon some moderation as the price of its assistance, is a question of detail which has to be solved in every age and in every country. But it seems to me that all laws intended for the protection of debtors on terms short of the payment of the whole debt—laws of bankruptcy, laws for the exemption of property from execution—are founded on the view I take of the duties and interests of Society.

"It is clear however that our opponents assume that the laws of other nations are in accordance with their views of what is a righteous law of debtor and creditor. And, indeed, in another

passage occurring amongt his general observations, Mr. Justice Turner speaks of such legislation as ours as being 'a divergence from the laws ordinarily accepted by civilized nations.'

Now I do not myself profess much knowledge of any law except the laws of England and of India. But the Council are aware that the Bombay Government lately appointed a Commission to enquire into certain serious outrages committed in some of the districts of the Dekkhan by the peasants upon the money lending classes. That Commission have made an able and elaborate report. They draw a very distressing picture of the state of the country, and they assign as one of its causes the state of our law of debtor and creditor. I will read to the Council what they say of the law of India as compared with other laws. They speak thus :—

"'In order to recover a debt, it is obvious that resort can only be had to the property, present and future, of the debtor and to the labour of the debtor and his family. A law which allows an unlimited resort to all these means of recovery gives the greatest help to the creditor that it is physically possible to give. The law of India appears to be the only modern law which allows such unlimited resort, and we find that under it the debtor and his family are liable in person and property to an extent which is practically unlimited.'

Imprisonment.

"Then they go on to mention some details of our law and of other laws, and they continue thus :—

"'96. The mere statement of what the power of the creditor is, would seem in itself a sufficient answer to the question. The power to utterly ruin and enslave the debtor is a power which clearly the creditor ought not to have, and as a fact it was never intended when the Code itself was passed that the creditor should have it. The ancient laws of most countries,' says Mill, 'were all severity to the debtor. They invested the creditor with a power of coercion more or less tyrannical, which he might use against his insolvent debtor, either to extort the surrender of hidden property or to obtain satisfaction of a vindictive character, which might console him for the non-payment of the debt. This arbitrary power has extended in some countries to making the insolvent debtor serve the creditor as his slave, in which plan there were at least some grains of common sense, since it might possibly be regarded as a scheme for making him work out the debt by his labour. In England the coercion assumed the milder form of ordinary imprisonment. The one and the other were the barbarous expedients of a rude age, repugnant to justice as well as to humanity.' When we compare the law of India with that of other countries, we find that not one is so oppressive as the Civil Procedure Code in this respect, not even the oldest law in the world, the law of Moses, which allowed the debtor a discharge after serving seven years.'

"The Commission are here speaking of our general law of debtor and creditor, not only of that which relates to the sale of land, but also of that which relates to the seizure of chattels and of the

person. But the Council will find that the whole of these subjects are mixed up together, and that those who object to the restriction of the creditor's power with respect to the sale of land are the persons who also object to the restriction of his power in other respects.

"Now with regard to the law of England, inasmuch as England may claim to have been in the rank of civilized nations for some time, I should like to give to the Council an account of what the law respecting the sale of land for debts has been and is there, which I think I may do without any great degree of prolixity.

"Before the reign of Edward I, land could not be taken in execution at all for a general debt. In that reign a Statute was passed known as the Statute of *elegit*. It gave to the creditor power to take the chattels of the debtor, except his oxen and his beasts of the plough, and power also to take one moiety of his land. The *elegit* creditor, as he was called, might take possession of the land, but he was subject to account for his receipts in the Court of Chancery, and he had no right to a sale. When he was fully repaid by the rents of the land, the debtor resumed possession. It is true that by means of successive *elegits*, as when various creditors took out judgment against a debtor, he might be deprived of the whole of his land instead of half. It is also true that possession by the *elegit* creditor not unfrequently resulted in the sale of the land, and that there was a tendency for such sales to increase; but such sales only took place through the medium of a Court of Equity, and with all due and proper safe-guards, and only in those cases (by no means all cases, though, as I have said, there was a tendency in them to increase) in which the Court had by some means or other acquired jurisdiction to sell. In such cases, to use the expressions of Mr. Justice Story, 'where the payment of the judgment cannot be obtained at all by a mere application of the rents and profits (as if the interest upon the judgment exceeds the annual rents and profits), or when the payment cannot be obtained out of the rents and profits within a reasonable time, Courts of Equity will accelerate the payment by decreeing a sale of the moiety of the lands.'

"Now that was the law of England for five hundred and fifty years; and it seems to me,—though of course it differs in detail for we have not the same machinery here as in England, but it seems to me a law not very unlike the arrangements which we con-

template, though more prohibitive of sales of land. It provided for payment of the creditor by the gradual application of the rents of the land for that purpose; it did not resort to the sale of land except where these means failed, and in many cases did not resort to it at all. And yet the existence of such a law did not prevent England from rising into the very front rank of commercial nations.

"It was not until the year 1838 that matters were thought ripe for an alteration of that law. In that year a Statute was passed which effected the alteration. First the creditor was enabled to take possession of the whole instead of only half of his debtor's land; and secondly, when he had procured a judgment of a superior Court, it had the same effect as if the debtor had agreed to charge his land with the amount of the debt.

"Unless some change has recently taken place which I do not happen to know of, that is the law of England at the present moment. And it is attended with incidents which must make it extremely unsatisfactory to those critics to whom I have referred; for it by no means gives to the creditor the short, sharp, swift, direct remedy against the debtor's land which they think is necessary for the law of a civilized country. In the first place, it is only the superior Courts—that is to say, some five or six Courts in England—which can issue decrees charging the land at all; and that is the sort of arrangement which my hon'ble friend Mr. Cockerell proposed for India. In the second place, though the creditor might at once take possession of his debtor's land, he must account for every farthing of his receipts in the Court of Chancery. In the third place he acquires no immediate right to sell that land. If he wants to sell, he must institute an entirely new suit in a Court of Equity; a Court which takes care that all parties interested are brought before it; a Court which will give every facility for arrangement and accommodation as it well knows how to do, and when it does decree a sale will take care that the sale is carried into effect with all due precautions and safeguards. In the fourth place, the creditor cannot institute even that new suit directly. The Statute says he must wait a full year after he has got his judgment, and after he has performed certain formalities with that judgment. And in the fifth place, our Parliament has been guilty of enacting what these gentlemen call a Usury Law; that is to say, they have provided that when the Court gives to the creditor the security of a

decree, his debt shall carry a Court rate of interest which they have fixed at four per cent.

"It must also be noticed that during all these centuries I have spoken of, there were other influences at work which tended very much to retard the passing of land from the hands of one class to the hands of another class. The most familiar of these influences is the system of entails or strict settlements, a thing so familiar to every reader of English history, that I will not trouble the Council with pointing out its effects. But there was another influence which has been much less observed upon, but which in all probability has exercised no less effect than the system of entails, and that is the action of the statesmen who presided over our Courts of Equity.

"In his concise and admirable account of the distinctive characteristics of Courts of Equity, Blackstone points out this among the chief; that they construed contracts for securing money in a different way from the way in which the same contracts were construed by Courts of law. In point of fact the Courts of Equity exercised a regulating power over such contracts,. and they excercised it in favour of debtors.

"The common form of a penal bond is this. A borrows £100 of B, and he contracts that if he does not pay B within twelve months he shall pay £200. The terms of the contract are as clear as noonday; and yet the Courts of Equity held that the penalty of £200 was a mere fashion of speech, Shylock's merry jest, a sort of playful way of securing principal and interest. And accordingly to principal and interest they confined the creditor, and they prohibited him from suing for the penalty.

"The common form of mortgage is, that the borrower conveys his land to the lender out and out, but with a proviso that if he pays the lender the sum borrowed in the course of a year, the conveyance shall be void; otherwise it remains indefeasible. Again I say the contract is as clear as noonday, but Courts of Equity applied to it the same construction that they applied to penal bonds, and they allowed a debtor to redeem his land after very long periods of time on payment of principal and interest.

"Now that is something like interference with contracts. And indeed there were not wanting eminent persons, principally common lawyers, who denounced the proceedings of the Courts of Equity

in language as vigorous as that in which our far milder proceedings are denounced at the present moment. The battle was nearly over by Lord Hale's time, but even he complains that 'by the growth of Equity on Equity the heart of the Common Law is eaten out, and legal settlements are destroyed.' The fact is that these proceedings of the Courts of Equity led to very sharp collisions between them and the Courts of Law. But the Courts of Equity held their ground, because the good sense of the nation was at their back. Their doctrine as to mortgages has long since formed part and parcel of the framework of the Law of England; and their doctrines as to bonds were imported into Common Law Courts by a Statute passed in the reign of Queen Anne.

"Now upon that brief review of English history I think the Council will have observed two things. One is the extreme slowness with which, even in an advancing commercial nation like ours, the *corpus* of the land, as distinguished from its temporary and redeemable possession, was made available to answer general debts. The other is the care which our legislature took, when it was at last giving the creditor full remedies against his debtor's land, to provide that these remedies should be worked with due moderation and caution, and under due control.

"Slow and spontaneous changes such as these are the healthy growth of nations. But some of our critics tell us that we are right, indeed that we are bound, to introduce all these changes, and more than all, at once, without the slightest attempt at mitigation, by foreign rule, into extremely backward communities. Certain abstract principles are brandished in our faces, and we are told that if we hesitate to transmute money-debts into the ownership of the debtor's land, we are setting ourselves against the experience and wisdom of ages. I answer that the study of history and the study of contemporary phenomena equally convince me that nations do not accept that species of transmutation very readily; and that for us to put it into force without any attempt at mitigation among primitive agricultural communities is not Political Economy; it is not Policy; it is not Economy, nor any combination of the two; but it rather savours of pedantry, and of a disposition to treat matters on some *à priori* theory, instead of dealing with men as we find them.

"Having now as I trust disposed of the assertion that we are setting ourselves against the example of all civilized nations and on principles peculiar to Indian official nature, I proceed to examine the assertion that even in India such a proposal as we have made can only be due to some violent oscillation of official opinion.

"The existing Code of 1859 contains the following provisions:— By section 243 it is provided that where the property attached consists of land, it shall be competent to the Court to appoint a manager, and that the manager shall collect the rents and apply them in payment of the debt, and to the term of such management no limit of time is assigned. It is also provided that if the judgment-debtor can satisfy the Court that there is a reasonable ground to believe that the amount of the judgment may be raised by mortgage, lease or private sale, it shall be competent to the Court to postpone the sale for such period as it may think proper to enable the judgment-debtor to raise the amount. And again to that postponement no limit of time is assigned. Now I think that those who followed me in my exposition of Bill No. V, sections 320 to 325, will see that the Court has here given to it powers as wide and large as those which we propose to bestow upon Collectors. It may pay the debt by management, and by gradually applying the rents and profits. It may allow the judgment-debtor to try his hand at making arrangements short of a suit. In point of fact the powers given to the Court are somewhat larger, because we propose to limit the Collector's operations to twenty years, whereas the Code leaves the Court's operation unlimited in point of time; and we propose not to apply our provision to mortgage-debts, whereas this section is sô framed as to apply to mortgage-debts.

"By section 248 it is provided that if the property to be sold is land, and the Government shall so direct, the sale shall be conducted by the Collector on the requisition of the Court. And by section 244 it is provided that in such a case as is mentioned in section 248.

'If the Collector shall represent to the Court that a public sale of the land is objectionable, and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land, the Court may authorize the Collector, on security for the amount of the decree or for the value of such land being given, to make provision for such satisfaction in the manner recommended by the Collector, instead of proceeding to a public sale of the land.'

"Now what is the object of these sections? To find that, I refer to the debates which took place in Council when the Legislature was engaged in discussing the Code.

"In the first place the Council had before it much evidence of the mischief and embarrassment which was being produced by the rapid transfer of land from one class to another, and they had also before them a despatch from the Secretary of State, Lord Stanley, written in 1857, the terms of which I will proceed to state. He began by saying :—

"'It cannot be doubted that the increased powers in respect of suits relating to real property, which of late years have been conferred upon the Subordinate Civil Courts, have greatly promoted the rapid transfer of such property from old to new hands.'

"Then he goes into some details on the subject, and continues thus :—

"'With reference to the foregoing remarks, the question arises as to the expediency of altering the existing constitution of the Munsifs' Courts, and of reverting to the system under which they were tribunals for the adjudication of suits only for money or other personal property, at the same time enlarging, if thought advisable, their jurisdiction in such cases. A further check might be imposed by providing that no process either for attachment or sale of real property shall be allowed in cases below a fixed amount, and that in suits exceeding that amount the Munsif shall not be competent to issue such a process without the previous sanction of the Judge.'

"That was the proposal made by Bill No. IV which my hon'ble friend Mr. Cockerell explained to the Council at Simla. There was another proposal before the Council, that they should put some express prohibition upon sales, in what form I do not exactly know, for the principle was discussed without any definite plan being propounded; but the Council did not see their way to it. Neither did they see their way to the suggestion made by Lord Stanley. Whether they rejected it on account of the practical considerations which have influenced us I cannot find. At all events they did not accept either of those two suggestions, but instead thereof, and with the same object, they enacted these sections which I have been citing.

"Sir Henry Harington moved to insert that section which is now section 243, and the reason he gave is stated as follows :—

"'The addition proposed by him was intended to meet to some extent the objections entertained by many persons to the sale of land in satisfaction of money-decrees. He would not now go into the very important question as to whether such sales should or should not be allowed.'

"He then intimates his opinion that there was some exaggeration in the matter, and that alienation of land could not be prevented.

"Mr. Currie proposed the introduction of the section which, with a difference, is now section 244, and he spoke thus :—

"'He remarked that the present section went a step further than the last section. The Judge of Cawnpore, the Commissioner of Allahabad, and the Agra Sadr Court, objected to the indiscriminate sale of land. Mr. Muir objected to any sale of land at all under civil process. He (MR. CURRIE) would not go so far as Mr. Muir. He agreed generally with what had been said on the subject by the Hon'ble Member for the North-Western Provinces. But even if it were admitted that the transfer of the land from the hands of the old proprietors was an unmitigated evil, still in the existing state of things that would be no sufficient reason for a general stoppage of sales.

"'Something however was to be conceded to opinions so strongly expressed and urged by the authorities he had named. The new section which he proposed would enable the revenue authorities to interfere in behalf of old proprietors in all cases in which such interference could be beneficially exercised.'

"Now I will ask what difference is discernible between the policy of 1859 and the policy of 1877. Then, as now, there were differences of opinion on this subject; then, I hope I may say as now, the majority of opinions was, that something should be done to check the indiscriminate sale of land; then, as now, the Council rejected the proposal to confine decrees for the sale of land to District Courts and the proposal to put a direct prohibition on such sales; as then, as now, they resorted to the scheme of giving large powers of arrangement to some authority which in the first instance they said should be a Court of Law; and then, as now, they contemplated that these powers should be exercised by the Collector.

"I do not find that any body then came forward to tell the Council that they were meditating confiscation or interference with contracts. But if we are doing so, most certainly they were. If I am a creditor seeking to sell my debtor's land, and if it is confiscation of my rights to tell me that I must be content with payment out of the rents, it is no consolation whatever to me that the officer who tells me so is called a Judge instead of being called a Collector, or that he is a Collector set to work by a Judge instead of being a Collector set to work by the Government.

"However that was the reasonable policy which our predecessors adopted, to call in some controlling power to make reasonable arrangements, which might be the Court or which might be the

Collector. Unfortunately it was suggested by somebody that if the land was in the hands of the Collector, some further security was required for the payment of the debt; though nobody seemed to dream that any further security was required when exactly the same process was going on in the hands of the Court. But in the course of the debate, apparently without any further consideration, that idea was accepted, and the clause I read to the Council about security was put in, which converted section 244 to almost an absolute dead letter. There is the section however and as evidence of the policy of the legislature it and the reasons for it remain; and we ought not to be charged with violent oscillations of opinion and departure from the policy of our predecessors because we are attempting to make a living letter of that which has become almost a dead letter.

"But I have something more to say on this point. The Code of 1859 extended of its own force only to the Regulation Provinces of the three Presidencies. With respect to the rest of India it is extendible by order of the Executive Government. When it came to be extended to Non-Regulation Provinces, it was found that although in other respects it might be suitable to those Provinces, in respect of the sale of land which it authorizes so freely it was not suitable; and accordingly the Lieutenant-Governor of Bengal extended it to his Non-Regulation Provinces, or to some of them, with the proviso that the land should not be sold without the consent of some executive authority. Well His Honor had no power to do that. The moment this question came up before the Council they proceeded to alter the Code; and in the month of July 1859 Sir Henry Harington introduced a Bill to enable the Local Governments of the Non-Regulation Provinces to do the thing that the Lieutenant-Governor of Bengal had assumed to do.

"On that occasion he spoke as follows:—

"'Lastly, the Bill proposed an alteration in section 385 of the Code. That section set forth that the Act should not take effect in any part of the territories not subject to the general Regulation of Bengal, Madras and Bombay, until the same should be extended thereto by the Governor-General of India in Council, or by the Local Government to which such territory was subordinate, and notified in the Gazette. Hon'ble Members might have observed in a recent number of the *Calcutta Gazette*, that the Lieutenant-Governor of Bengal had extended the Act to certain Non-Regulation districts under his Government; but that in doing so, His Honor had added a proviso that no sale of land should be made without the sanction of the Commissioner of the Province. The Code

contained no such provision, and a question might arise as to the competency of the Lieutenant-Governor to pursue this course, and whether, if he extended the Code at all, he was not bound to extend the whole Code. But as it seemed very desirable that the power exercised by the Lieutenant-Governor of Bengal in this instance should exist somewhere, the Bill proposed to authorize the Government of a Non-Regulation Province to which the Act might be extended, with the previous sanction of the Governor-General of India in Council, to declare that the Act should take effect therein subject to any restriction, limitation or proviso which it might think proper.'

"The Bill was then passed into Law. It has since been re-enacted, and it stands now as section 39 of Act XXIII of 1861. I have before stated to the Council how very largely that restriction on the sale of land has been used. The modifying power extends as you have heard to the whole of the Code; but it has hardly been used at all, except only for the one purpose of moderating the sale of land; and for that purpose it has been used throughout very large Provinces. I am not prepared to say in how large a portion of the Non-Regulation Provinces of India, but certainly throughout the Punjab and Oudh and the Central Provinces the Code was only put into operation subject to the restriction that the sale of land in execution of decrees should not take place without the consent of some executive authority.

"Well now we have this result, that for the purpose of preventing the too indiscriminate sales of land which it was found the Code allowed, the Council of that day, the very same men who passed the Code, within four months after they passed it into law, passed an amending Act giving powers to the Executive of an extent and magnitude compared to which the powers we propose to give are the merest flea-bite; not a mere power to say that certain operations may be executed by one hand instead of another, but a power to extend the Code subject to any restriction, limitation or proviso whatever. And it is not right that we should be charged with departing violently from the policy of our predecessors, when we are only following their footsteps at a humble distance.

"Now I hope I have given the Council reason to think that the condemnation of our proceedings, however confidently and boldly pronounced, is founded on erroneous data and on a narrow and partial view of the case. At all events I am anxious to hear the allegations and arguments by which that condemnation is supported in Council. I know that whatever can be said on that subject will be said by my friend Maharaja Jotindra Mohun Tagore; for in

Committee he has supported the views of the objectors with great ability and acuteness, and I must add with equal good feeling and moderation.

"The next question is, whether we have any case for altering the arrangements of the law at all. And here again I find a disposition to assume that our district officers must all be mistaken in what they think they see; and that if there is any mischief going on, it is all due to other causes, and not to this cause, namely, the state of the law of creditor and debtor. Other causes no doubt there are, but it seems to me impossible to doubt that this cause also exists, unless we are prepared to say that a great number of intelligent gentlemen, knowing the country thoroughly, better than any other men, some of them appointed to enquire into this very matter, are all mistaken in what they think they see and hear. I have told the Council before how much evidence there is on this point, and I will now add one other piece of evidence which has come to my hands since I last spoke on this subject. The Dekkhan Commission say :—

Increase of money-holders and money-lending business.

"'62. Another cause of the increase of indebtedness is the facility with which the money-lending class can command the assistance of the law in the recovery of debt, and consequent upon that facility an expansion of the raiyat's credit, inducing numbers of small capitalists to compete for investments in loans to the Kunbi. We have already quoted Sir G. Wingate's remarks on this point. Although at the present time other causes have combined to impair the raiyat's credit, still one material cause of his present condition must undoubtedly be sought in the state of things described in 1852; and since that date other causes have operated to aggravate immensely the evil which was then discerned. Whatever facilities were afforded by the law to the creditor in 1852 have been greatly enhanced by the introduction of the present procedure in 1859, and by the punctual conduct of judicial duties now exacted from the Subordinate Courts, while the raiyat's credit has been enhanced by the addition of his land and agricultural stock and implements to the security liable for his debts.'

"It is their opinion that the provisions of the law and the much greater swiftness with which the law is executed have aggravated the miserable condition in which they found the peasants of that part of the country. They no doubt are speaking of the law at large and not merely of that part of it which relates to sales of land. As regards sales we have this broad fact, that the complaints which come to us are from those parts of the country where the Code is at work without restriction; and those parts of the country in which it operates subject to restriction are the parts from which

complaints do not come. That seems to me a cogent piece of evidence.

"Our case then is this:—We have evidence, which seems to us conclusive, that the Code has worked in a harsh, rigid, mechanical way, which leads to the ruin of the debtor, sometimes with benefit to the creditor, sometimes without any such corresponding benefit. We do not assume to regulate the contracts of mankind; we are not reverting to any patriarchal system of government; but we say that Society ought not to be a mere passive instrument in the hands of creditors for the purpose of skinning their debtors, and that the Code, not in its own nature, nor by the intention of its framers, but in its working, has been made too passive an instrument for that purpose. We are not foolish enough to suppose that we can control human nature; but we say that mischief which has been created by foreign and artificial causes may be remedied by modifying those causes; that what procedure has done procedure may undo; and we believe that we are swimming with the stream, and not against the stream, of human nature.

"The next question is, whether the alteration we propose is the best we can make. We have not seen our way to other alterations. One other alteration, namely, to confine sales of land to decrees of District Courts, we did propose, but have abstained from pressing it in the face of practical objections. What we do see our way to is the constitution of some authority which will have the power and the will to make some reasonable arrangements between creditor and debtor in those painful circumstances in which the *ultima ratio* has been applied, which will prevent the Code from being merely the means of carrying out to the bitter end that *summum jus* which is proverbially *summa injuria,* and which may in proper cases answer the old prayer of the debtor, 'have patience with me, and I will pay thee all.'

"We are trying to give life to the intentions of our predecessors which have to a great extent failed of effect; for not only have the provisions of section 244, but also those of section 243, failed to a very great extent. That matter was the subject of inquiry by the Government of the North-Western Provinces in 1873, and they received from their officers some accounts of the working of the sections. They sum up the matter thus:—

Opinion of Government, North-Western Provinces.

"'It will be seen that nearly all the officers consulted by the Court are of opinion that the sections in question are almost inoperative either from the ignorance of the judgment-debtor, or from the difficulties in the way of settlement under them. But His Honor the Lieutenant-Governor concurs with the Hon'ble Judges of the Court and the Board of Revenue in thinking that the sections do a certain amount of good, and work for the benefit both of creditors and debtors.'

"Now of course sections that are almost inoperative cannot do much amount of good. What is meant clearly is, that the sections are good in themselves: that they are right in principle; that where they do work they do good, but unfortunately they are almost inoperative. I believe that these sections will remain inoperative as long as the motive power is confined to Courts of Law. Such operations are not judicial in their character; they are matters of arrangement and discretion and are quite extra-judicial. They are far more likely to be carried into effect by a person who knows the property, knows the place, knows the people, is accustomed to move about and visit his villages, and is in the habit of making administrative arrangements, than by a man who is accustomed to sit in his own Court, and to decide such legal points as are brought before him. This was seen quite clearly by our predecessors when they passed section 244, avowedly as a further step in the same direction with section 243, and with the view (I will quote the words again) 'that the Revenue-authorities should be enabled to interfere on behalf of local proprietors in all cases in which such interference may be beneficially exercised.' That view has not been answered because of the reasons which I have mentioned; and we seek now to make that a living letter which remains a dead one. We see no better plan than to follow the same line of policy, and to call on the Collector to exercise a reasonable discretion, not only when a Court of law thinks fit, but when the Government thinks fit.

"We are not proposing any rigid law* for the whole of India. It is only when the Executive Government thinks that a part of the country requires these provisions, and also that there are hands to work them, that they will be applied. When that is the case, we wish the Government to have those powers which the Bombay Government desired to exercise in 1875, but were deterred from exercising by the opinion—no doubt a very well founded opinion—of the High Court as to the state of the law. Now I confess that

it is at this point that the palsy of doubt begins to affect my mind. I will read a few words from a very valuable paper sent to us by the Advocate General of Bengal, Mr. Paul. He is a gentleman of great experience in Mufassal affairs. He quite approves of what we propose to do for the purpose of softening the law against the debtor; he is only sorry we do not carry some of our provisions a good deal further. He says:—

"'If the Collector who may be charged with the execution of decrees be an officer who has sufficient time in his hands to devote to the new department of jurisdiction intended to be created, I think the exercise of the powers proposed to be given to the Collector will be beneficial to debtors.'

"That is just it; 'if the Collector has time.' It may be that the Collector has not time. It may be that the Collector's hands will require strengthening. It may be that in order to work this provision efficiently, we shall have to go further and do what Sir Richard Temple has recommended us to do, namely, to establish a separate execution department. But practical difficulties of that kind are no reason against giving powers to the Government which are sound in principle and which may be exercised in places where no such practical difficulties exist.

"Now I have finished what I had to say upon sections 320 to 325. I do not propose to say anything now upon section 327 but would prefer to hear the reasons of my hon'ble friend Maharaja Jotindra Mohan Tagore for expunging it from the Bill, because I apprehend that what I have said on the other part of the case will with some little addition be sufficient to constitute a good defence.

"But before I close I must call the attention of the Council to section 266, for that also is a part of our work on which we are said to be sentimental, patriarchal, violent, and all the rest of it. I am glad to think no person wishes us quite to go back to the simplicity of the present Code, and to exempt nothing whatever from being taken by the creditor in execution, and that there is no motion on the paper to expunge any of the items which we propose to exempt from execution. In fact I think that members of the Committee were satisfied that we were not being guided by pure sentiment, but that we gave to the matter a fair amount of hard-headed, if not hard-hearted, consideration. I must however tell the Council what alterations have been made. In sub-section (b) we have adopted the language of an old Bombay Regulation, the repeal of which

by the Code of 1859, as the Dekkhan Commission inform us, has caused much distress. It exempts tools, implements of husbandry and such cattle as are necessary to enable a man to earn his livelihood by agriculture. This latter part accords with the first English Statute which gave powers to the creditor to seize his debtor's goods. Sub-section (*c*) has been modified by the provision that it shall not apply to the execution of decrees for rent. The peculiar relation of landlord and tenant induced us to put in this provision. In sub-section (*h*), which applies to the salaries of public officers, or quasi public officers such as Railway-servants, we have, instead of exempting the whole of the salary, applied the principle of the English Mutiny Act, and exempted only a moiety. That is a course suggested by Mr. Justice Turner among the many valuable and careful suggestions which he has made to us for the alteration of the Bill. With these exceptions we have maintained the exemptions which were contained in section 266 of our Bill No. IV. But I should mention that there are two items which appear to be very important ones, those contained in sub-sections (*g*) and (*i*), but they are only an expression of the present law culled from the Pensions Act and from the Indian Articles of War. They are only put in here for convenience sake so as to have the whole of the exemptions in a single list.

"There are some other minor points connected with the law of debtor and creditor as to which some people think us foolishly indulgent to debtors, but they are comparatively trifling, and I do not think that the Council would be grateful to me if I took up further time by discussing them. I must therefore leave them to be opened by any other Hon'ble Member who may feel it desirable to do so."

The motion was put and agreed to.

The Hon'ble MAHARAJA JOTINDRA MOHAN TAGORE moved that section 417 be omitted. He said that after the very able and exhaustive statement made by the hon'ble and learned member in charge of Bill he had reason to modify his opinions as to sections 320 to 325, regarding which he had given notice of amendment. He gathered that there were certain pars of the country in which the restrictions on the sale of land were absolutely necessary for political purposes; that was a matter respecting which he had nothing to say. He was of opinion that, as regarded Bengal, these sections would be mischievous in their effect, and he therefore desired to oppose them;

but supposing that his amendments were accepted, he feared from the explanations given that certain parts of the country would be in a very unsatisfactory condition. He therefore did not desire to press them; the more so as the sections were of a permissive nature, and he had sufficient confidence in the special circumstances of Bengal, and in the judgment of His Honor the Lieutenant-Governor, to believe that these sections would not be applied to Bengal. He begged leave accordingly to withdraw the amendment which stood in his name with regard to sections 320 to 325. Section 327 was so closely connected with the previous sections, that for the reasons he had already stated, he begged to withdraw his amendment regarding that section also. He next begged to move that section 417 be omitted. Nearly two decades had elasped since Act VIII of 1859 was passed, and from that time up to the present day the Munsifs had had the power of trying cases in which Government or its officers were concerned. The Principal Sadr Amins, or Subordinate Judges as they were now called, had enjoyed this power from a period long anterior even to that; but now it was proposed to make a retrograde move. He was not aware that there was anything to show that these officers had deteriorated either in character or competency. On the contrary Hon'ble Members of this Council, such as Sir William Muir and Sir Alexander Arbuthnot, had spoken in respect of the provinces which they represented in very high terms of the integrity and efficiency of these judicial officers. Sir Richard Temple in his Administrations Report said :—

" Now I have constantly inquired from all sorts of persons likely to know, European and Native, official and non-official, and the universal opinion attests the integrity and probity of the Native Judges, that is, the Subordinate Judges and the Munsifs. This is to my mind a striking circumstance, and a cause for thankfulness, inasmuch as corruption used to be one of the traditional evils of India."

The High Court said in one of its reports :—

" The Court has had increasing reason to be satisfied with the performance and promise of the inferior judicial officers under its control, who in point of ability, competency, and attention, are far beyond the Munsifs of former periods. The character of this class of officers has long stood high, but the superior mode in which the business of their Courts is now transacted fully attests the wisdom of the Government in improving their condition in respect of emoluments and prospects."

Mr. Justice Jackson said:—

" I now come to the Munsifs, and I am able to say with confidence that they continue as a class to improve in carefulness and to bear a high character. We are no longer under

the necessity of employing very young men, and we are able to insist upon the possession of some experience in addition to that of learning and ability which are indicated by the possession of a degree. Generally speaking therefore the Munsifs, even at the beginning of their carreer, are well prepared for the performance of their judicial duties; and failure in that respect is of great rarity."

Sir Richard Couch remarked :—

"The appeal from a Munsif is in most cases heard by a Judge who is not superior in knowledge or ability to the Judge whose decision is appealed against; in some instances he is inferior."

Mr. Justice Bayley said :—

"My own later experience here is that a Munsif in the Court of first instance, who has been educated in our colleges and schools, and takes his law degree in our University, not only discharges his duty with ability, but with a faithfulness and care and perspicuity which is certainly not surpassed, if it is equalled (except in cases of promotion from the same style of men,) by some of the Subordinate Native Judges who hear the Munsif's appeals."

Mr. Justice Markby said :—

"In discussing the important question now raised it will not be safe to disguise the truth, however unpalatable it may be; and that the Courts of appeal in Lower Bengal are frequently below them, it is I fear impossible to deny. I insert again here the opinions upon which in my former Minute I based this conclusion. None of these opinions have since been withdrawn. No opinion to the contrary has been since expressed. And my own more recent experience has strengthened me in the view that the conclusion I then stated and now repeat was correct."

Now he would not detain the Council by reading any more extracts, but after the testimony of these high authorities, it would be an ill recompense to the Subordinate Judges and Munsifs to put such restrictions on the power which they had so long enjoyed, and which as far as he was aware, they had never abused. If the Government would not trust these subordinate Courts, the people would naturally hesitate to place any confidence in them, and the effect of this section would be prejudicial to the administration of justice. It had been said that this section had been introduced to prevent unseemly conflicts between the Munsifs and the executive; but he did not understand why there should be any friction between the two classes. Both served the same Government, and both were appointed to administer the law; the members of one class were amenable to the other only when there was an infringement of the law, and even then the officer who tried the case was bound by the Code under which he acted, and he could not go beyond that. Some cases were cited in which it was alleged that the Munsifs were influenced by their bias

against the executive. He was not acquainted with the merits of these cases, and he could not therefore say how far those decisions were influenced by *animus* against the officers of Government, or were errors of judgment ; but he knew of other cases in which, although it was at first believed that the Munsifs were biased in their decisions, those very decisions were on appeal upheld by the highest tribunal. Mr. Justice Innes of Madras, commenting on this section of the Bill, said :—

"Section 416 appears to be conceived in a similar spirit of distrust. It is certainly a retrograde step, and one much to be deprecated, that at a time when the Native Judicial service is in education and integrity so much in advance of what it was before the enactment of the present Procedure Code, the Legislature should revive a restriction of the jurisdiction of these officers, which is certainly, so far as my experience goes, not called for by their mode of dealing with suits of the kind referred to in this section, namely, suits by or against Government or public officers."

Indeed he considered it very inconsistent, in the face of testimony of so many high authorities, as regards the integrity, conscientiousness, and efficiency of the subordinate judicial officers, to hold that they were likely to be biased in their judgment against the executive officers or the Government they served. It had also been urged that cases in which the Government or its officers were interested often involved questions of large and important public interest, and that the Munsifs were unable to form any opinion upon them. But in such cases he submitted the remedy was always ready at hand. Section 25 of the new Bill provided that any District Court might, on the application of either of the parties, or of its own motion, withdraw a suit from any Subordinate Court and try it itself, or transfer it to any other Court of competent jurisdiction. The Government therefore could on sufficient ground apply at any time for the transfer of a suit from the Munsif's Court. Further he submitted that it was not conducive to public interests to provide a special tribunal for the trial of suits in which Government or its officers were interested. Sir Richard Garth questioned if it was either necessary or desirable to withdraw all suits against public officers from the jurisdiction of the inferior Courts ; and His Honour the Lieutenant-Governor said that it seemed to him quite impossible for Government to say, as it did here that the Courts which it provided for the public were good enough for ordinary suitors, but not good enough for its officers. Under these circumstances he earnestly trusted that the Hon'ble Council in its wisdom would see fit to ex-

punge this section, which would otherwise remain a standing reproach upon a deserving class of officers, and have a most discouraging and disheartening effect upon them.

The Hon'ble Mr. Cockerell thought that the remarks which prefaced the amendment propounded by his hon'ble friend the Maharaja, would have been more in point if applied to the corresponding provisions of Bill No. IV in relation to the subject of the amendment.

His hon'ble friend had commented on the section which he desired to strike out of the Bill as though its effect was to take away absolutely the existing jurisdiction of the inferior Courts of first instance in respect to suits against the Government and public officers. That statement of the case would more or less correctly apply to the proposals of the former Bill in regard to this matter; but those proposals had undergone material modification, and all that was now desired was that the inferior should obtain the sanction of the superior Courts, ere proceeding to try suits of that class instituted before them.

He would further submit that in treating this matter as a question of the proved competency or otherwise of the inferior Courts, his hon'ble friend had narrowed very considerably the issue upon which the subject-matter of the amendment should be considered and dealt with by the Council. We were not now called upon—as it seemed to him (Mr. Cockerell)—to determine by our action in this matter whether these Courts were or were not competent to deal satisfactorily with this class of suits, but to determine a question of much wider character, and one that should be considered and decided on a much broader basis—namely on the grounds of the general public convenience—the advantage and pecuniary interest of the tax-paying community, and on such grounds he held that the provisions of the Bill before the Council should be maintained and the amendment of his hon'ble friend should not be accepted.

As regards the question of the established efficiency of our lower Civil Courts, and the extent to which they enjoyed the confidence of the people at large, there was no doubt a good deal to be said on both sides; for whilst on the one hand there had been very great improvement in the personal qualifications in the direction of a superior education and legal training, of the Judges of these Courts—and indeed he felt that it was almost presumptuous, and at least

superfluous, to offer any opinion or bear any personal testimony to a fact so clearly brought out in the recorded opinions of those who were of course far more competent to speak authoritatively on such a subject, some of which opinions had been cited in the speech of his hon'ble friend the mover of the amendment—but on the other hand, in Bengal at least, there was evidence to show that these Courts were according to a well-informed section of public opinion far from having attained perfection.

So recently as the period—about two years ago—at which much public discussion took place in regard to the Bengal Civil Appeals Bill, it was urged very strongly that it was impolitic and inexpedient to take any action which would have the effect of curtailing the existing area of appeal whilst the majority of the Courts of first instance were in such an unsatisfactory condition, and that the essential first step towards a substantial reform of the administration of Civil justice was the amelioration of the character of the inferior Courts of original jurisdiction.

At a public meeting held he believed in the rooms, and under the auspices, of the distinguished Association with which the hon'ble mover of the amendment and another of their hon'ble colleagues (the Maharaja Narendra Krishna) were connected, this view of the question was strongly insisted on—a Bengalee gentleman of wide reputation who possessed large estates, with whom he (Mr. Cockerell) had the honor of having been acquainted for many years past, and whose personal experience and knowledge of the question then under discussion he believed to be unsurpassed, spoke on that occasion as follows:—

"Our Munsiffs, who have to try a large number of original suits, and almost the whole class of suits between landlords and their tenants, are chiefly young University graduates, who have no knowledge of the world, and who are in many points as ignorant of the habits, customs, and feelings of the people as any European. They are usually required, after they have obtained their diploma in law, to practise in the High Court, or some Zillah Court, before they are appointed as Munsiffs. This should doubtless give them an insight into the working of the Courts, and to the practical operation of the laws, but as a matter of fact this condition is of very little use. Those who can secure good practice do not care to exchange their profession for the service, while it is only those whom we might describe in one word as "briefless," and who, after a short time, give up attending Courts, which entails some expense, that are appointed Munsiffs." *

That was the candidly expressed opinion, not of an European official too often credited with the indisposition, from selfish motives

to accord the full recognition and generous acknowledgment of the value of the services of his Native fellow-officials which those services may have merited, but of a fellow-countryman of the Native Judges themselves, and a fellow-countryman moreover whose opportunities for forming a correct judgment on the matter, and general competency to speak with some authority on such a subject, he (Mr. Cockerell) was sure that his hon'ble friend the Maharaja could not gainsay.

But as he had said before he did not think that the question before the Council ought to be determined upon this issue, and he had only referred to the subject for the purpose of showing that an argument against the amendment, even on the ground just stated, was not absolutely untenable. He had moreover cited the speech above mentioned in reference to what had passed when this Bill was last before the Council, on which occasion he had been rather severely taken to task by two Hon'ble Members, who seemed to think that their lengthened period of service and assumed intimate acquaintance with the people of this country entitled them to speak with paramount authority on such a question, for his remarks in regard to the personal characteristics of the Native Judges of our inferior Civil Courts in Bengal; he thought it right therefore, and in fact incumbent upon him in justice to himself, to appeal to the plainly declared opinion of one of their own countrymen, which had been delivered under the responsibility that attaches to public utterances, in corroboration of all that he had then advanced.

Passing now to the question as to how the disposal of this class of suits could be arranged so as to conduce most to the interest and advantage of the community, he would first ask, what there was in the way of novelty or innovation in the principle underlying the arrangement by which particular classes of suits or proceedings, or suits or proceedings affecting particular classes of persons, were reserved to particular Courts? He could point to several enactments by which the cognizance of particular kinds of suits and proceedings was reserved to special Courts or classes of Courts. So also institutions of suits or appeals were restricted to a few Courts only in certain cases. He would take an example of this, appeals against the decrees and orders of Munsifs. These appeals, though they might be, and in the majority of cases were, tried by Subordinate Judges, could be instituted in the district Court only. Or he might

refer to Small Cause Courts, which, although the Judges of these Courts were picked men of undoubted competency, had not jurisdiction even to attach immoveable property in execution of their decrees.

Indeed he might say that there was no class of Courts the jurisdiction of which was not restricted or limited in some direction; and his contention was therefore that the reservation of the cognizance of, or power to deal with, a particular class of suits to certain specified Courts, did not necessarily imply the disparagement of any other Courts to which such authority was not extended, and he hoped that the Council would not, from a too tender regard for the sensitiveness of Munsifs or any other class of Judges, or from any apprehension of popular misconstruction of the object of the change in the law contemplated by the Bill in its present shape, be induced to settle this question otherwise than on the broad grounds of sound policy and the general interests of the tax-payer.

In determining a question of this sort some regard should, he thought, be had to the generally important character as well as the comparative number of the suits which, as regards the choice of forum, it was proposed to deal with in an exceptional manner. Now there could be no question in his opinion as to the greater relative importance of these suits as compared with that of suits between private parties, whilst their number was comparatively insignificant.

From the sort of criticism that the action of Government was so often subjected to, the popular conception of it would seem to attribute to it a personal character, and that, moreover, of a not very creditable type; nevertheless the Government did not make an unscrupulous use of its power; it was not aggressive in its instincts, nor did it evince a tendency to encroach on or trample upon the rights of individuals. So far from this being the case as was so frequently, by implication at least, suggested, the Government was in fact in its appearance before the Courts, whether as prosecutor or defendant, no more nor less than the legal representative of the tax-paying community, endeavouring to protect the rights of that community which had been invaded or menaced by its opponent in the suit. Such being the case it would be natural to suppose that the support and sympathy of the public in such a contest would be on the side of the Government, whereas the exact reverse of this was found to be the case, and notoriously the Government, instead of

enjoying special advantages in the conduct of its litigation, might be said to litigate at great disadvantage. This fact was brought out clearly in the very small percentage of costs recovered in execution of its decrees.

Another important consideration in favour of the course proposed in the Bill was the increasing difficulty in regard to the maintenance of an adequate legal agency for the conduct of suits. If the Government must defend suits and carry on litigation, in every Civil Court in the country, it was evident that an expenditure for the maintenance of an adequate staff of Government Pleaders must be incurred which would be wholly unreasonable with reference to the object in view, and entail a burden upon the finances of the Empire, and consequently upon the tax-payer, which the exigencies of the case would not justify.

For these reasons he hoped that the amendment of his hon'ble friend, the Mahárájá would not be accepted.

The Hon'ble MAHÁRÁJÁ NARENDRA KRISHNA said that it was with extreme diffidence he would venture to offer a few remarks on this Bill. It aimed at consolidating into one law all the enactments passed by the legislature from time to time for regulating the trial of civil suits. If even the legislature had confined itself strictly to the mere embodiment of the provisions of the old laws into one compact form, the opportunity should not have been lost of introducing improvements urgently needed, or of adopting modifications and omissions justified by past experience. But when there was obvious departure from this circumscribed course; when it was proposed to curtail the powers of some judicial officers and to increase those of others; when important changes in Civil Procedure were suggested, surely it behoved them to consider and discuss, not only the new points brought forward, but also to recommend important improvements which might occur to them, inasmuch as such a proceeding would obviate the inevitable necessity of re-discussing the consolidated Bill soon after it passed into law. He would observe in the first place that the terms of the contract between lender and borrower should always be allowed to be settled among themselves by laws based on the sound principles of equity and political economy. The capitalist, when he was forced to go to law to enforce the fulfilment of the terms of the contract, had to encounter difficulties of various sorts, and incur certain unavoidable expenses not recoverable

by law, up to the date of the realisation of his money. It would therefore be considered a grievance by the capitalist if the rate of interest contracted for was cut down after the decree at the discretion of the Court; a proceeding which directly tended to over-ride the substantive law on the subject as provided in section 2 of Act XXVIII of 1855. The kind object of the legislature—to protect the helpless borrower—might be defeated by the lender exacting commission and other charges before granting the loan, knowing that the law would only sanction the legal rate of interest. He would therefore recommend that the substantive law in respect of the rate of interest be not interfered with by the present Bill. The Bill threw greater obstacles in the execution of decrees than formerly existed, as by section 230 the decree-holder must apply for its execution on or before three years from the date of a decree; and if in the first execution he failed to realise any benefit therefrom, he would not be allowed a second execution, unless he proved to the satisfaction of the Court that he had exerted himself to give effect to it. This would in effect facilitate the evasion of the payment of a just debt, and would shield a fraudulent debtor. If the decree was kept alive by due measures the time for its execution should not be barred until after the expiration of twelve years.

His Excellency THE PRESIDENT said that he was unwilling to disturb or interrupt the Hon'ble Member, and had therefore not done so before, as he was under the impression that his hon'ble friend intended to move another amendment; but he would beg to remind him that the Council had now before them the amendment proposed by Máhárájá Jotíndra Mohan Tagore.

The Hon'ble MAHÁRÁJÁ NARENDRA KRISHNA said that he had been making remarks on the general contents of the Bill. However as His Excellency had stated that it was the amendment only which was at present before the Council for consideration, he begged to state that he gave the amendment his unqualified support, as he failed to see that any evidence had been brought forward to enable the Council to form an opinion that the suits in question should not be tried by subordinate judges. It was a matter of regret that the country would very soon be deprived of the valuable services of the Hon'ble Sir Arthur Hobhouse; the laws passed which he had the charge of had been generally received by the public with satisfaction. With high legal attainments he combined an earnest regard for the

welfare of the sons of the soil, and his approaching departure therefore would be felt by them as a great loss.

The Hon'ble MR. HOPE said that at this late hour he would only say a few words on the amendment which had been proposed. He perfectly agreed with his hon'ble friend Mr. Cockerell in the view he took, that in placing the question before the Council as if it were chiefly one of competency or incompetency of Munsifs or Native Judges generally, the hon'ble mover of the amendment rather placed it on a false issue. When on a former occasion certain remarks were made tending to suggest doubt as to the competency of the Munsifs, he himself spoke up in defence of them as far as regarded his own Presidency; and he should be ready to do the same on any future occasion. But that was not a matter with which they had any concern at present.

His hon'ble friend the Mahárájá, in commencing to justify the amendment, had spoken of the law as it existed in Bengal as if he were under the impression that the same law prevailed all over India; and it would appear that he was under the same sort of misapprehension as he had told the Council he was under in regard to the previous amendment which he had on the notice paper. But the second clause of this section might have reminded his hon'ble friend of his error. For instance, he might mention that the law in the Bombay Presidency was, and had been for a long series of years, that all Subordinate Judges were excluded from the trial of Government suits—and not only was that the case, but provisions to that effect which were inserted in the Bombay Revenue Jurisdiction Bill had been passed by the public, and by high official authority, without a single word of comment. His hon'ble friend apprehended that if the trial of these cases should be confined to too narrow limits, the public would hesitate to submit their own private concerns to the determination of the Subordinate Judges, and that it would be a standing blot against them. Now it was well-known that none of these consequences had ensued in the Presidency of Bombay, where this restriction was in force; on the contrary, we were frequently told that nothing could be higher than the position the Native Judges occupied amongst the people, notwithstanding they were under the disability which was now objected to.

With reference to the remarks which his hon'ble friend also made, that we should not have special tribunals for the trial of pub-

lic suits Mr. Hope might point out that Munsifs' Courts might, as it was, be called special tribunals, for they were subject to a money-limit as to jurisdiction ; and it appeared to him that there was no reason why they should be allowed to try cases against Government without limit of any kind when they were subjected to a prohibitive limit in another direction.

Moreover, the section of the Code which was under consideration was of a purely permissive nature. It did not prohibit the subordinate Courts from trying cases of the nature to which it referred. But it provided that when a case of this description came before such a Court, a certain time should be allowed during which the Government, if it thought necessary, might come forward and make any objection it might have to the case being so tried, and the decision on such objection would rest with the superior judicial tribunals. With reference to the allusion made to section 25, as giving the Government all the power it could require in this respect, he would state that, so far as his experience went, he believed it would be very much more difficult to bring the provisions of section 25 to bear on a case of this kind than to work section 417. Section 25 was intended to be applied as an exceptional and special remedy; and it would not be considered by the District Courts as a sufficient reason for removing a suit from a Subordinate Court, to state that it was a suit of importance. In such a case the superior Court would hold that the Subordinate Court was empowered to try such cases ; and as no special reason for the application could be given, it would decline to remove the suit from the lower court. He was speaking in this matter from experience, as it had been his fate more than once to apply to a superior Court to have a Government suit withdrawn from a subordinate tribunal and to meet with a refusal. Even if the provision on this subject in Bill No. IV had been passed without alteration, it would have been nothing more than re-enacting the general law of Bombay, which had existed for a long time without any ill effects have been felt. But in the way the provision had now been put, it was merely a provision by which suits of great importance, or in respect to which strong local feeling existed, could be withdrawn from the cognizance of the Subordinate Courts ; and not only was the power of withdrawal as now provided less derogatory to the dignity of the presiding officer of the subordinate Court, but it would effect an immense saving in the matter of time and expense to the parties ; because, if

the case was a large and important one, it was not to be supposed that the Government would accept the verdict of the lowest Court, unless it were clearly shown that they were wrong: they would carry the case upwards even to the High Court.

The Hon'ble SIR JOHN STRACHEY said, if the amendment had been brought forward with an object the very opposite of that with which the amendment of the Hon'ble Member was made, and it had been proposed to take away altogether from the subordinate Courts the power of hearing suits against the Secretary of State in Council and the officers of the Government for acts done in their official capacity, he for his part should have given it his support. Amongst civilised nations, such as those which existed in some of the countries of Europe, the best safeguard against arbitrary and illegal acts on the part of the officers of Government was to give the Courts of law authority to decide between the persons who considered themselves aggrieved and the officers of Government. That was true where the Government was the servant and not the master of the people, and where both the people and the Government had perfect confidence in the Courts. But it seemed to him that that was by no means true in a country like India. He believed that through nearly the whole of India the people were quite incapable of understanding the idea that the proper way of giving to a man the means of redress for injury received at the hands of the Government, was to give him the power to bring a suit in a petty Civil Court. Sir John Strachey believed that if the man thought at all, which he certainly did not do on such a subject, the only light in which he could look on such a law was that it was another illustration of the strange fancies that his English Governors took into their heads.

He believed the law in regard to this matter to be wrong in principle. He quite admitted that it had done little or no harm in practice. The hon'ble member said that these powers had not been abused. Sir John Strachey had no doubt that that was perfectly true. But he thought it would be more correct to say that these powers had been little used, and consequently they had done no harm. Still he thought them wrong in principle, because he believed that the first object essential in this country was a strong executive authority. Giving power to petty Civil Courts to call in question acts of the executive authority gave as a matter of fact the people no means whatever of redress against injuries inflicted upon them. But to give

these powers to subordinate Courts had a distinct tendency to weaken that authority which it ought always to be our object to strengthen. This particular little section to which the hon'ble member objected, in Sir John Strachey's opinion, did not go half far enough. Still it was better than nothing, and he accepted it with a certain amount of thankfulness.

The Hon'ble Sir Alexander Arbuthnot intended to vote in favour of the amendment. He regarded this question, as his hon'ble friend Sir John Strachey regarded it, mainly from a political point of view. But the conclusions at which he arrived from a consideration of the question were, he regretted to say, essentially different from the conclusions at which his hon'ble colleague had arrived. It seemed to be admitted on all hands that no serious practical inconvenience of any sort had resulted from the state of the law as it now stood in the Statute-book. Had the section proposed by the Select Committee been embodied in the existing law; had it been in operation ever since the Code of Civil Procedure had been passed in 1859; had it been merely a re-enactment of a provision already in the Code, he should not have been disposed to advocate its removal. But he thought that the case was essentially different when it was suggested to remove from a body of useful public servants powers and jurisdiction which they had long exercised without apparently any perceptible disadvantage to the State. And when we had before us the evidence of numerous eminent judicial officers—and he thought he might add the evidence and opinion of numerous members of the official class not belonging to the judicial establishments of the country—that the efficiency of the subordinate Courts during the last twenty years had vastly and remarkably increased, he thought that, for the sake of what his hon'ble colleague regarded as a principle, which he himself regarded as an idea, but about which there might be a good deal of dispute—he thought that it would not be the part of wisdom that this Council should show that mistrust which would be indicated by the passing of this section as it now stood in the Bill, towards the particular class of judicial officers against whom it was directed.

His hon'ble colleague had more than once in the course of his speech designated these Courts as petty Civil Courts. They were of course Courts of inferior jurisdiction, but they were Courts of great importance and deserving of great consideration in connection with

the administration of justice. Our policy, our aim, and our desire had been for many years by every possible means in our power to raise and elevate the standard of these Courts. It was not denied that a great deal had been effected in that direction. There might be many difficulties; there probably were some inefficient Judges. But even in other ranks of the judiciary instances of that sort were not wanting. And he deemed it to be a good and salutary principle that if you wanted to make people trustworthy, you should show them that you trusted them; and when you had indications of real and material improvement, then he thought that it was a mistake to pass any measure calculated to manifest a distrust which was not called for by the most urgent and practical reasons of State policy.

The Hon'ble SIR ARTHUR HOBHOUSE said:—"Perhaps it is because I have never been in the painful position in which my hon'ble friend Mr. Hope tells the Council he has often been placed, namely, as defendant to a suit, that I have never been able to satisfy myself that this is a question of very serious importance. Even if the clause stood as it was in Bill No. IV, I do not think it is very important. And that is shown by nobody being able to show any evidence of the ill-working of the law, either in Bengal where the subordinate Courts entertain these suits without restriction, or in Bombay where they are forbidden to entertain them at all. If the clause stood as in Bill No. IV, I confess I should not be able to maintain my ground against such an argument as we have heard from my hon'ble friend Mahárájá Jotindra Mohan Tagore. I have shown that conviction in the most practical way by succumbing to his arguments in Committee, and voting with him on his proposal to alter Bill No. IV. But it seems to me that the rule now laid down in Bill No. V gives a convenient rule of practice. It is one which will leave all petty suits of this kind to be decided in the Munsifs' Courts, and will give time to consider whether the more important suits shall be taken into the District Courts. My hon'ble friends have advanced arguments for this provision which I will not repeat. But there is one argument which seems to me worth consideration, and that is the argument which arises from the course of appeal. If a suit is decided in a Munsif's Court the appeal lies to the District Court, and the case does not reach the High Court excepting in that most unsatisfactory of all shapes, a special appeal. But if a suit is decided in the first instance in the District Court, then the appeal lies direct

to the High Court, which has the whole case before it and can decide according to the merits. I believe I am right in saying that my hon'ble friend the Maharaja Jotindra Mohan Tagore and those with whom he acts have the greatest confidence in the High Courts, and would be glad that cases of importance should be decided on their merits by those Courts. It is true that the District Court can call up a case when it thinks fit. But it is not nearly so likely to call up a case in the ordinary course as if there was a provision for a particular class of suits that notice should be given to it upon which it should make up its mind. It seems to me that this is a provision which is likely to operate as intended, namely, that important cases should be decided, as it is desirable they should be decided, by the higher tribunals, and that unimportant cases should continue to be tried, as they are now tried, by the subordinate Courts.

HIS HONOUR THE LIEUTENANT-GOVERNOR said he felt ashamed to take up the time of the Council at that late hour, but as his hon'ble friend Mahárájá Jotindra Mohan Tagore had done him the honour to refer to him, he must say that he entirely agreed with his hon'ble friend in every word that he had said in support of the amendment. HIS HONOUR observed that during this discussion the whole of the arguments which had been used had been directed to the question of the Munsifs' Courts. But it was not only that class of officers who were placed under an implied ban, but the whole of the Subordinate Judges of the country were by this section to be branded as being unworthy to be trusted with the trial of suits in which Government servants were concerned. He thought it was very wrong in principle that the Government should now come forward, on no particular grounds, and state by implication that it considered that its Native Judges were not to be trusted to try cases in which the Government were concerned, although they were perfectly competent to try cases in which other classes were concerned, and claim for itself and its officers exceptional treatment in the Courts.

No doubt the section as it had now been amended was less open to objection than it was in the previous Bill, but it was still so worded as to throw a great slur on the whole of that valuable class of officers, the subordinate Judicial officers. For his part he thought nothing showed so clearly the good effect education had had in this country as the extraordinary improvement which had

taken place of late years in the efficiency and morality of the Subordinate Judges, and our judicial establishments generally; and he thought that no more unfitting time could have been chosen than this to cast such a slur upon a most deserving class of officers. His hon'ble friend Mr. Cockerell stated that cases of abuse of authority by Munsifs in trying Government suits, and hostility on their part to the executive officer, had become so frequent as to constitute a public scandal such as he considered would justify the passing of the provision now under discussion. HIS HONOUR had called for a return from the records of the Bengal Secretary's office of the number of cases which came before the Local Government, in which there was reason to suppose that officers of this class had abused their power, and he found that only two complaints of any kind had ever come under the notice of Government. One of these cases was the case of a Munsif who, acting with the concurrence of the District Judge, ordered the arrest of a Magistrate who had neglected to obey an injunction of the Court. That, HIS HONOUR admitted, was an unfortunate case; but cases of occasional abuse of authority were not confined to Munsifs or Native officers, and in this case Government would have gained nothing by the interference of the Judge, who, though consulted, never attempted to guide the Munsif to do otherwise than he did do, and must therefore be presumed to have thought him right. The case occurred many years ago and the Munsif was punished. The other case to which he referred occurred a short time ago, in which a Munsif gave a decree against an executive officer for interfering with what he believed to be an obstruction on the public highway. The case was appealed to the District Judge, who gave his decision to the same effect as the Munsif; so that there would have been no difference if that case had gone originally to the Judge instead of to the Munsif. From the decision of the Judge the case was appealed to the High Court, who decided that the Native Judge was right and the executive officer wrong. Therefore, the only two cases which HIS HONOUR had been able to find were entirely opposed to the assumption of his hon'ble friend Mr. Cockerell as to the present state of the law leading to judicial scandals. As far as HIS HONOUR was aware, there was no such scandal as that which had been alleged. If there was any thing of the sort, the records of Government would surely show it.

The only other reason which had been given for introducing this section—at least as far as regards its application to Bengal—was, that some similar section had existed in Bombay for many years. But he submitted that if that was the law in Bombay, the proper method of legislating was to bring Bombay forward to the state of things which was in force and which had worked so successfully here, and not to push Bengal back to the condition of things which existed in Bombay.

He could not altogether agree in what had fallen from his hon'ble friend Sir John Strachey, because, although HIS HONOUR agreed with him that it was most important to maintain a strong executive administration in this country, yet there was no way in which an Executive Government could better show its strength and its consciousness that its acts were all founded on a just consideration for the rights of others, than by its willingness to submit its conduct to the criticism of the Courts, and to stand before these Courts on terms of absolute equality with the humblest suitor.

The question being put,

The Council divided—

Ayes.	Noes.
Maharaja Jotindro Mohun Tagore.	Mr. Cockerell.
Mr. Colvin.	Mr. Cowie.
Mr. Bullen Smith.	Mr. Hope.
Maharaja Narendra Krishna.	Sir E. Johnson.
Sir A. Clarke.	Sir J. Strachey.
Sir. A. J. Arbuthnot.	Sir E. C. Bayley.
His Honour the Lieutenant-Governor.	Sir A. Hobhouse.
His Excellency the President.	

So the motion was carried.

The Council adjourned till Thursday the 29th March 1877.

The Council met at Government House on Thursday, the 29th March 1877.

The Hon'ble SIR EDWARD BAYLEY moved the following amendments :—

That in section 322, *for* clauses (*b*), (*c*) and (*d*), the following clauses be substituted :—

(*b*) by mortgaging the whole or any part of such property : or

(*c*) by selling part of such property : or

(*d*) by letting on farm or managing by himself or another the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or

(*e*) partly by one of such modes and partly by another or others of them.

He said that if Hon'ble Members would look at section 322 as at present amended, they would see that clauses (*b*) and (*c*) and (*e*) of the proposed amended section were counterparts of clauses in the present section. The whole force of the amendment lay in the clause which was lettered (*d*). As the section at present stood in the Bill, the Collector was authorized to do what the proposed amendment gave him power to do, *but only at the request of the decree-holder*, and in such case there was no limit of time according to the Bill as at present drawn to his management or interference. Sir Edward Bayley's proposed amendment was in effect to give the Collector this discretion without the consent of the decree-holder, but it limited the term of his management to a period of twenty years. The main object which particularly he had in view was the treatment of the very numerous class of petty holdings and rights in the Upper Provinces, which it was very difficult to deal with in any other way. As a matter of fact these rights were often attached for default of revenue, and he could recollect, amongst his earliest experiences, the late Mr. Thomason was ever urging upon all Revenue Officers the extreme expediency of adopting this course of procedure in preference to any other, that was to say, the expediency of satisfying the demand against the defaulter by transferring his share to the management of some coproprietor or fellow-sharer. The properties in themselves were very often mixed up with those of others, so that it was difficult to get any one except a fellow-villager to take them in mortgage; indeed a class of persons who were unused to the village system generally, could hardly afford to take them up in mortgage, but the villagers could usually manage such properties among themselves in some way or other together with their own holdings and make a profit by it. In fact this practice of managing the shares of others was a natural and indigenous arrangement which had always gone on with regard to absent sharers of every kind. If a man went on a pilgrimage, or enlisted, or left the village for any other reason, his share was usually made over to one or other of the shareholders in the village who dealt with it as the owner, paid his revenue and ordinarily managed his

domestic affairs for him. There was no law precisely on this subject; it had been a kind of natural arrangement, an arrangement on honour utilized for the mutual advantage of the people of the village. And in many cases the right of the absent shareholder had been protected in that way long beyond the periods of limitation. When Sir Edward Bayley had charge of the Kangra district shortly after it came under British rule, he found that during the previous government of the Sikhs and Goorkhas, large numbers of villagers had left in discontent and had sought refuge across the Sutlej in States under our protection. But when the Kangra district fell under the British Government these men returned. It was a long time however before they were all aware of the ameliorated condition of things at their own homes; some did not come back for eight or ten years after we occupied that district. Many had been absent twenty, thirty, forty, and fifty years, and in the meantime the regular settlement had been made in the Kangra district, and the rights of the absentees had been settled with others; but when these men came back, they invariably looked to receive back their property, and a practice instituted by his predecessor Mr. George Barnes was followed with great success. A man, for example, came back and said—"Forty years ago I left this village, and my rights were made over to such and such other persons." The claimant was referred to the Chief Revenue Officer of the district, who had instructions to take the claimant to his village and settle the case by voluntary agreement amongst the villagers, and in no single case was the right of these men ever refused. On the contrary, the right was acknowledged in spite of the lapse of many years, and in spite of the fact of a new setlement having been made giving to those others in possession a legal and usually indefeasible claim to the property. It was amongst that class of people the natural mode of helping absent shareholders; it had therefore been the practice we had adopted with great advantage in managing the estates of petty revenue defaulters; it was an extremely ancient practice, and it was more applicable to that class of cases than any other mode, and it seemed one, then, which it was wise and appropriate to adopt in realizing other demands besides those for arrears of revenue.

The objections to the proposal to give the Collector the power of adopting this mode of arrangement were of two classes. One

of the objections was that the management did not secure the immediate payment of the creditor, and that the creditor having got a decree for immediate and instant payment without regard to any other interest, was entitled to have the benefit of that immediate payment. This opinion Sir Edward Bayley knew was very strongly held by very many gentlemen. But he thought the speech of his hon'ble friend Sir Arthur Hobhouse the other day must have convinced them that it was a principle absolutely unknown to the English law—a principle which he might say was not recognized by law in any civilized country. It was a theory which had grown up, he believed, in India alone amongst a certain class of jurists who had not very wide experience of the principles of jurisprudence, and which they were pleased to think was a logical result of the doctrines of political economy. Sir Edward Bayley thought it could hardly be called the result of the doctrines of any science at all, much less of the doctrines of political economy. He did not himself see how such result was to be upheld without contravening the real principles of political economy, or applying them blindly, and without reference to the fitness of the application, to the facts of the case before the Council.

The other objection was that we should give a great deal of trouble to the Collector. He understood that there would probably be on the average about two hundred and fifty cases of execution of decrees against landed property made over to the Collector in each district of the North-Western Provinces where this class of cases was most likely to arise. It was not proposed, nor was it likely, that they should be all dealt with in this way. In some cases no doubt actual sale would take place; in others some of the various modes provided in this section of the Bill would be put into use. It would probably be only in cases of small petty holdings which were almost of no saleable value that the mode provided by clause (*d*) of his amended section would be employed: if these were left to any other process, it was a question even whether the creditor would in most cases ever realize his decree. Indeed such a mode of dealing with cases of this sort would ignore what Sir Edward Bayley thought he had shown to be the indigenous and natural and popular means of getting over such difficulties, the practice employed by the people themselves time out of mind, and

which gave a reasonable hope that the creditor himself might get his money sooner or later.

The extreme number of twenty years had been fixed for this process, because it was supposed that if the object of the management could not be effected in twenty years, there would be little hope that it could be effected at all. As a matter of fact twenty years was an extreme time. He believed that five, ten or fifteen years were the ordinary terms for which shares were put under management for default in payment of revenue. The amendment would of course include all the Provinces which had small tenures,—the Panjab, Oudh, and the greater part of the Central Provinces. He could not of course speak so confidently as regards other Provinces, such as Bombay and Madras. This mode might not be equally applicable to them. But it was quite competent to the Local Government to give a discretion to their Collectors as to the use of these powers, assuming that the sale of lands in execution of decrees was made over to them. He believed that in one or two large provinces—Madras and Bengal for instance—the agency of the Collector would probably be not employed at all. At any rate, it would only be in those particular instances in which this mode of procedure was applicable that it would be usually applied; and in those it only would be practically useful, and then probably it would be the only way in which the creditor would have a chance in most cases of realizing the full amount of his decree. He however regretted to say that clause had been struck out of the Bill in Committee under what he believed to be a misapprehension of its true character and probable effect, and he therefore at the time gave notice that he should move to re-introduce it on the present discussion of the Bill in Council. It was with this object that he moved the amendment. He might say a good deal more on the general principle of this clause, but he thought what had been said would be sufficient to allow the Council to understand the urgency of the reasons upon which he proceeded, and to enable the Council to judge of the expediency of restoring it.

The Hon'ble Maharaja Jotindra Mohan Tagore said that he did not pretend to any knowledge of jurisprudence, English or Indian; but speaking from a common-sense view of the question, he was one of those who thought that a creditor ought to have every reasonable facility for the recovery of his money at the time

stipulated in the contract entered into by his debtor. He fully appreciated the generous motive of the hon'ble mover of this amendment, but he was sorry he could not support a proposal which attempted to favour the debtor at the expense of an innocent third party. The judgment-creditor might have had to raise the money on the strength of his higher credit from some Bank or some other source, and might have advanced it to his debtor in the certain belief that he would receive back his money within the stipulated period, and thus be able to liquidate his own loan on the due date. There were many people in this country who advanced money in this way. But if the Collector were to step in and order the judgment-debtor to repay his debt by instalments spreading over twenty years, and that too without interest, it might be a great blessing to the debtor, but it would be absolute ruin to the honest creditor. It would be reversing the principle of the maxim, that one should be just before he was generous, if this amendment were accepted; for the Collector would have the sanction of the legislature to be generous before he was just. Besides this, he was not sure whether the amendment if passed would be altogether a boon to the class for whose benefit it was intended. The better class of capitalists would retire from the field and the money-lending business would be in the hands of less scrupulous men. The greater the obstacles thrown in the way of the execution of decrees, the more stringent would be the conditions imposed by the money-lenders to cover the risk which they would have to run. The effect of the amendment would, he feared, very likely be that no money would be advanced on mere credit, and those who required to borrow would be forced to mortgage their property and land or to sell them outright. For these reasons he was opposed to the amendment.

The Hon'ble MR. COCKRELL said the hon'ble mover of the amendment had suggested the possibility of the Bill having assumed its present shape in Committee owing to some misapprehension on the part of the hon'ble members by whose vote its provisions in regard to the subject of the amendment were determined. He wished therefore to state for his own part, as one of the majority by whose opinions those provisions were regulated, to disclaim most emphatically any misapprehension as to their effect, and he proposed to confirm this statement by the vote which he would give to-day in the event of the Council dividing on the subject of the

amendment. The difference between the hon'ble member's amendment and the provisions of the Bill on this subject was simply this, that whereas the Bill would allow farming and managing for a period not exceeding twenty years where the decree-holder consented, the hon'ble member's amendment would allow of such a course whether the decree-holder consented or not. There was no other difference between the procedure of the Bill in regard to this matter and the proposals of the hon'ble mover of the amendment.

The hon'ble member who last addressed the Council had spoken of the hardship of postponing for such a long period the settlement of the decree-holder's claims without his consent, and had pointed out that there were conceivable cases in which such postponement would be almost tantamount to the ruin of the decree-holder. He (Mr. Cockerell) thought that this was probably not an exaggerated view of the case. Decree-holders were not necessarily always capitalists, who, so long as the security was good and the interest adequate, could afford to wait for the gradual repayment of their advances.

He believed that it was a not uncommon practice in this country —at all events it was so in Lower Bengal—for people to advance on good security, money which they had either themselves borrowed from others, or for the early return of which they had made themselves responsible, and if they did not recover their money so as to be in a position to replace it within the period upon which they had calculated, it was not too much to say that the consequence might be absolute ruin to them.

Where there was no such exigency for an early recovery of the amount advanced, it was reasonable to suppose that the legitimate influence of the Collector, which was recognized in Bengal to a considerable degree, and in the North-Western Provinces and in Bombay and Madras to an even greater extent, would be always found sufficient to effect an arrangement for the satisfaction of the decree-holder's claims by the process of gradual liquidation.

Hence it seemed to him that the distinctive feature of the amendment, as contrasted with the existing provision of the Bill, would—if the amendment prevailed—only come into operation in those cases in which it would be a *quasi* suicidal action on the part of the decree-holder to consent of his own free will to a protracted liquidation of his claim; and it was for the Council to consider

whether it would be justifiable to provide for the relief of the judgment-debtor to the extent of inflicting such possible injury on the decree-holder, in circumstances for which it was fair to presume that the judgment-debtor rather than the decree-holder was equitably responsible.

The Hon'ble Mr. Hope said the objection which was taken to the amendment by the two Hon'ble Members who had spoken reminded him somewhat of the objection which was made by one of them in the course of the discussion on section 417 yesterday, to the effect that if the course proposed was taken, some very dire consequences would ensue. He would remind the Council of the fact he laid before them then as to the dire consequences threatened in the event, of all clases of Courts not being allowed to try the highest classes of suits not involving money. We were now told that unless the clause was allowed to stand as it was at present, money-lenders stood a very poor chance of being repaid. The answer to that objection was essentially the same as the answer to the other. The answer to the objection against the other clause was that in the case of the Bombay Presidency the law was diametrically opposed to the law in the Lower Provinces, and yet none of those consequences had ensued. On the present question he would point out that hitherto in many of the Native States, some of which were admirably administered by most distinguished men, we did not find this severe law for the sale of land in execution of money-decrees and for imprisonment for debt, and yet the people managed to get loans, and money-lenders were not ruined at all. He thought it would be better if, instead of arguing on speculative and *à priori* grounds, we were to look at what was going on in these Native States. We were told that in most respects they were much behind us, but he thought that in these matters, in some matters connected with land-administration and everything in fact in which action to suit native peculiarities was concerned, they were indeed in advance of us. This had, he thought, been well brought out by the replies given to the question asked in 1867 regarding the relative merits of British and Native Rule, which had been printed in a Blue Book and laid before Parliament.

The Hon'ble Sir John Strachey said :—"I do not wish to give an altogether silent vote in favour of the amendment of my hon'ble friend Sir Edward Bayley, because I think it the duty of

those who have for many years taken part in the actual every-day work of district and provincial administration, and who may be supposed to have thus obtained some practical acquaintance with the country and the people, not to remain silent on such a question as this, even when they feel that really nothing remains to be said about it. The question raised by this amendment is, I think, in reality the same as that on which my hon'ble friend Sir A. Hobhouse spoke yesterday with such admirable and convincing ability. My hon'ble friend performed by that speech a great public service. He put this most important question of the sale of land in execution of decrees in its true light, and while he has left nothing, I think, for those who agree with him to say, except indeed to express their admiration and gratitude, I am quite sure that he has left nothing to be said by those who disagree with him. I predict that my hon'ble friend, by his speech of yesterday, has closed for the present generation all controversy on this subject. That speech teaches us how we ought to vote on the amendment of my hon'ble friend Sir E. Bayley, for this amendment is the logical outcome of the principle which Sir A. Hobhouse explained to us yesterday, and which I hope I may assume that the unanimous voice of this Council has approved. If we admit that great social and political evils have to be remedied or prevented, and if we say that our Courts shall not be instruments for bringing undeserved misery and ruin upon debtors, and that we have to provide an authority which shall be able to bring about fair and equitable arrangements between debtors and creditors, it follows necessarily that the more we can in a reasonable way strengthen the hands of that authority, the more chance there will be that we shall succeed in the objects at which we aim. The provision in the Bill as it now stands, that it is only with the consent of the creditor that certain measures for saving the property of the debtor from being sold in execution of a decree can be adopted, is entirely opposed to the assumption with which we start. To say that the consent of the decree-holder shall be necessary is flatly to contradict the principle which we now desire to maintain. If the amendment of my hon'ble friend be carried, I believe that the single serious blot which now remains in this provision of the Bill will be removed; and the Council may then hope that the law has at last been put into a shape which will make it possible to carry out the object which the most experienced officers through-

out the greater part of India have been for years declaring to be of paramount importance, and which my hon'ble friend Sir A. Hobhouse told us yesterday will be in complete accordance with the intentions of the eminent men by whom the Code of Civil Procedure was framed. Having, my Lord, myself held almost every office, both in the Regulation and Non-regulation Provinces of Northern India, which a Member of the Civil Service ordinarily can hold, I have had perhaps better opportunities than most men, of at least making myself acquainted with the views which have been held on this subject by the most distinguished officers of the Government, and by the most intelligent members of the native community. I know of course that high authorities have thought otherwise; but even they I believe must admit that there is perhaps no great subject of public importance that can be named on which there has been so general a consensus of opinion in Northern India as there has been on this.

"There has no doubt been much discussion about the exact nature of the remedies to be applied, but almost every one has agreed that the unrestricted transfer of land to strangers in the execution of decrees for debt has led and is leading to much social misery and political danger. My own personal experience during the last thirty years or more enables me to confirm without hesitation the statement which was made yesterday by my hon'ble friend Sir A. Hobhouse, that this is a subject on which there has been no oscillation of opinion; and it seems to me impossible to suppose that all the eminent men who for a great number of years past have had the best possible opportunities of forming an opinion on the subject should have come to this practically unanimous conclusion without good reason.

"I think, my Lord, that the truth is that the authorities who have taken the other side of the question have sometimes been led astray by the mistaken application of true economical principles. The present case offers a good illustration of the way in which political economy gets a bad name without the least reason. The truth seems to me to be, in the present instance, that the principles of political economy do not in the very slightest degree teach us, that in Northern India, or in many other parts of India, there ought to be no interference with the sales of land in execution of decrees. What political economy does teach us in regard to this matter is

merely this abstract principle, that such interference tends *primâ facie* to cause loss of wealth to the community. But a Political Economist, if he understands his own science rightly, does not go beyond this, and he may with complete consistency declare that there are other, and perhaps more important, considerations than those which his own science deals with, which render it wise to accept such loss; and he may even believe that neglect of those considerations will lead to loss of wealth still greater. I am convinced that such considerations exist in the present case. Political economy never teaches us to carry out theories without reference to facts. I deny that these provisions of the Bill are open to economical objections, and I believe that, with the amendment which my hon'ble friend Sir E. Bayley has now proposed, they will afford a very moderate, reasonable, but I hope sufficient, safeguard against serious evils without interfering with any true principles."

The Hon'ble Sir Arthur Hobhouse said:—"To a certain extent my hon'ble friend Sir John Strachey has anticipated what I was about to say. It seems to me, as it does to him, that those who have accepted as sound the general line of argument that I submitted to the Council yesterday should support my hon'ble friend Sir Edward Bayley's amendment. We must remember that those powers which the amendment would give to the Collector are already in the bosom of the law although they there lie almost unused. Section 243 of the existing Code gives to the Court unlimited power to manage property which is attached, and to pay the debt gradually out of the rents. It also gives to the Courts unlimited power to postpone the sale in order that the judgment-debtor himself may make arrangements, one of which arrangements is letting the property in farm. Section 224 contemplates that the Collector may exercise similar powers, though unfortunately it is coupled with the fatal proviso that security must then be given for the amount of the debt or the value of the land. Now of course it is quite competent to our opponents to say that although these powers are already in the law they are mischievous, and that we ought to strike them out. But if we accept the principle that the decree-holder is not, and ought not to be, the owner of his debtor's land to all intents and purposes, then such a power as the amendment contemplates is most essential. The other courses which the Collector may take are sale, mortgage, or letting on such terms as will raise money at once to pay the debt.

But these courses all proceed on the principle that the creditor has a right to have an immediate and full payment of his debt out of his debtor's land, and they all involve practically the alienation of the land. What we want is some course which does not involve the final and complete alienation of the land, but which more resembles that course adopted by the English law under the writ of *elegit* which I mentioned yesterday. Suppose the case of a country which is desolated by famine. The land there may for a considerable space of time be producing absolutely nothing, and if the creditor elects to have the land of the debtor sold immediately or disposed of in some other way which shall raise the whole amount of the debt immediately, the land may go for next to nothing, and the creditor may buy it in, as he usually does, for next to nothing. But if the land can be held on for a time, better times will come, and the land may produce something not only for the creditor but also for its owner. I should therefore be very sorry if the Council thought it right to strike out of the existing law these powers which are in it. But if it is not right to strike them out, surely it is right to make them living powers instead of dead powers. I gave the Council yesterday evidence to show how very inoperative these sections had been, and it is my confident belief that if such discretions as these are left entirely to legal officers acting in districts where the peasant defendants are ignorant, helpless, without skilled advice, and totally unable to urge the Court into action, so long they will not be of any very great use. In fact it may be said that a Court of law carries such powers as these

> 'As the flint bears fire,
> Which much enforced shows a hasty spark,
> And straight is cold again.'

"Now our predecessors clearly saw that truth; they clearly saw that if they were to make these powers of use they must be committed to administrative hands and not only to legal hands. That is what I say now, and that is the effect of Sir Edward Bayley's amendment.

"The only alteration we are making in the principle of the law is that we do not require security to be given when the Collector has the management of the property. But as I understand the objection to the proposal, it is not grounded on the fear that the creditor will lose the security of the land, but on the hardship caused

by delay, and by keeping the creditor out of his money. Now the creditor is just as much kept out of his money whether security is given or not. By security we do not mean security that can be enforced during management: that would be an absurdity, and make the management totally nugatory. What is meant is that the creditor shall have security which shall take effect after the management comes to an end, or in case the land is sold under some paramount claim as for arrears of Government revenue. But such security as that is equally wanted when the Court has the management of the property. All the liabilities which may occur to the land in the hands of the Collector may equally occur to it when in the hands of the Court. No such security however is required if the Court has the management; and why it should be required because the Collector has the management I cannot conceive.

"Now I will make one or two remarks on the arguments which have been advanced against the amendment. I understand my hon'ble friend Maharaja Jotindra Mohun Tagore to rest his objection entirely on the right of the creditor to be paid at once and on the evils of delay; and as he said, if the Court has the power or the Collector has the power to order the debt to be paid by instalments, it will be a serious thing both to the lender and the borrower. Now the Court has the power under the Code, and has had the power at least since the year 1859—I do not know how long before—to direct any debt to be paid by instalments. Yet we have never heard that the money-market was disturbed by that power, or that either the lender or the borrower had been injured by the exercise of it.

"Then my hon'ble friend says that you will drive the honest and more respectable lenders out of the market and call in a class of men whom it is not advantageous to the borrower to call in. But that is a very speculative matter, and it is one to which the Dekkhan Commission have paid a good deal of attention. They give us an account of the classes and characters of money-lenders, and of the different ways in which different classes of lenders deal with borrowers; and the conclusion they come to is exactly the opposite to that to which my hon'ble friend comes. I do not say they are right; I am not competent to form an opinion. But I say that it is a purely conjectural matter, and I think that such arguments ought not to weigh with this Council one way or another.

"Then my hon'ble friend Mr. Cockerell says the small capitalists deal with capital which is not their own, but borrow for the purpose of lending again at a higher rate of interest. I am sorry to hear that the money-market is conducted on so rotten a system of dealing in money without capital, and I should be surprised to hear that the gentlemen who conduct their business in that way do not secure themselves by mortgages when they lend their money. The man who makes it his trade to borrow for the purpose of lending again is exactly the man who will secure himself by taking a mortgage. I think therefore we ought to know how that matter stands before we attach much weight to my hon'ble friend's argument.

"Then he tells us that the Collector's personal influence can effect such arrangements as are contemplated under this section. If that is so, surely it places the Collector in a more proper position to arm him with legal powers to do that which is a good thing, but which he now effects by some irregular, however beneficial, influence on the minds of the persons with whom he is brought into contact.

"I think it has not been sufficiently observed by those who oppose this amendment that these powers are not to take effect except in those cases in which there is reason to believe that the judgment-debts of the debtor can be discharged without the sale of the whole of the property. I cannot help thinking that the cases contemplated by my hon'ble friend Maharaja Jotindra Mohan Tagore and those who act with him are cases in which the property is in a hopeless state of insolvency. Those are not the cases in which the Collector is empowered to exercise the discretion which we propose to give to him. He has first to satisfy himself that the case is a *bonâ fide* one; that there is a property which if properly managed may satisfy the debt and leave something to the owner, but which, if it goes into the market at short notice and on peremptory sale, will be lost, with the result of ruining the debtor, perhaps without satisfying the creditor."

HIS HONOUR THE LIEUTENANT-GOVERNOR said that the section before the Council being entirely permissive, and being therefore not likely to affect the part of the country in which he was interested, he should not take up the time of the Council in discussing the general principle of this section. He believed that the provisions of the section were entirely inapplicable to the tenures of Bengal,

although it might be the case that they were absolutely necessary in some parts of the country of which he knew nothing. Therefore taking that view of the case, and accepting the assurance given by his hon'ble friend Sir John Strachey, that in Northern and Central India the provisions of these sections were really required, he should not oppose the amendment before the Council.

But he thought he might say a few words in regard to the probable practical working of these provisions, and to the allusions made during the discussion to the powers of the Revenue Courts to deal with the mass of business which would be thrown upon them. Judging from the experience of the Non-Regulation Provinces of Bengal, in which sections precisely similar to these had been applied by special Acts of Council, he thought that it would be found that the powers of the Collectors to deal with all cases which would come before them would be quite inadequate; and that the section could not be worked without a large increase of the Revenue-establishments. We had to work powers similar to these in certain districts of the Chutia Nagpur Division. He saw by a return before him that we had already 320 petty estates attached for debt in four districts, of which 167 were under the management of the Collector in one single district. In 89 cases the current annual demand was below Rs. 100 a year; in 87 cases it was above Rs. 100 and below Rs. 500. His Honour did not think it was one of the functions of the Government to take over the whole of the management of all the petty holdings of the country, and if the Government did do so, it would end by the Collectors being completely swamped with their work; for there was apparently scarcely an estate in the Dekkhan and parts of Northern India in which there were not already some heavy debts.

The Hon'ble Sir Edward Bayley wished to make a few remarks in closing this discussion, and in doing so he would not detain the Council long. The remarks which his hon'ble colleagues Sir John Strachey and Sir Arthur Hobhouse had made practically disposed of the theoretical part of the objections that were brought forward against the amendment so effectually that he only should diminish their force if he attempted to add any thing to what they had said in that respect. He wished rather to remark on one or two points of detail which those who opposed the amendment seemed to have overlooked. As regards the effect on a creditor who him-

self was a borrower, he thought not only had it been overlooked that the power of directing the payment of a debt by instalments was no new one, for it existed in the old law long before the Code of 1859, but the provisions of this Bill were not confined to debts of any particular class; they extended to all debtors, and if the unfortunate man who had borrowed money to lend it out again found himself in a difficulty, he would at the same time find under the other provisions of this Act that the Courts had power to give him also a very large measure of relief, so as to enable him to pay his debts without being brought to absolute ruin.

As regards moreover the economical effect which these clauses were likely to have, his hon'ble friend Mr. Hope had very justly pointed out that that particular principle on which they were founded had to a great extent been acted upon in Native States, and had there produced no such evil results as were anticipated. But Sir Edward Bayley would add also that it had been shown by experience they could be worked with equal benefit in our own Provinces. This was the case notably in the Punjab. The spirit of this law had been practically in operation there from the day of the annexation until now. And what was the result there? Was the land less valuable? Were the tenants less solvent? Was the rate of interest higher? Was there, as a matter of fact, greater difficulty in obtaining credit by tenants in the Punjab than elsewhere? It so happened that enquiries had been, independently of the subject-matter of this Bill, recently made on these points, and the result of the enquiry showed that the peasantry were less indebted and in a more flourishing condition than perhaps in any other British Province. No difficulty was found by them in obtaining money, nor, as far as he knew, did they pay a higher rate of interest than elsewhere. The real fact seemed to be that a moderate and merciful application of the law was in the long run as much to the interest of the creditor-class as to that of the debtor-class; it was certainly to the advantage of the creditor to have to do with a prosperous, contented and substantial class of debtors, rather than with a pauperized and insolvent class. Sir Edward Bayley thought that the Dekkhan Riots Commission had shown how that in certain parts of the country to which their particular enquiries extended, the unrestricted action of the Civil Courts had, by various abuses, which he would not stop to discuss, actually been the main cause of pro-

ducing the complete pauperization of the agricultural community. This surely was a result most deeply to be regretted, and he was certain nothing could be worse for the interests of the creditors themselves than the state of things disclosed in that report. The object of this Bill was to do something to prevent a similar state of things arising elsewhere, and the clauses he now moved were intended to give more full effect to the principle which the Bill had generally adopted in regard to the execution of decrees, and specially as regards those for the sale of land, and to facilitate the application of that principle in regard to the more humble and more ignorant class of debtors.

As regards one other question, namely, the influence which the Collector exercised in restraining the action of creditors, he thought it had been so satisfactorily set at rest by the remarks of his hon'ble friend Sir Arthur Hobhouse, that he (Sir Edward Bayley) need hardly say more, except that there were many cases in which neither the Collector nor any body in the world had any power to effect any thing with an unreasonable and harsh creditor.

He had only further to notice the objection which his hon'ble friend the Lieutenant-Governor had raised from his own experience in the Santhal Purganas, as to the capability of the Collector practically to work the provisions of this section; his hon'ble friend had, he thought, overlooked one material difference between the Collectors in Bengal and those in other parts of the country. In Bengal the Collectors had not at their disposal the agency of the officers called tahsildars in the Upper Provinces, and mamlatdars in Bombay; they had not in fact the machinery which was used in other Provinces. As Sir Edward Bayley had said before, an exactly similar power was used in other parts of the country for recovering arrears of revenue, and the work was entirely done by the Collectors through tahsildars. Supposing there were on the average from 240 to 250 cases of execution against land'd property a year in each Collectorate, probably to not one in twenty of these on the average would this particular procedure be applied. The work which it imposed on each tahsildar would probably not be more than six or seven hours a year in each case, and probably each tahsildar would at the outside never have more than fifteen or twenty such cases, and the supervising work of the Collector would not occupy him altogether more than one whole day in the year. Of course if there

was no such machinery in any particular Province, this clause would be inapplicable; and if it were desired to use it more effectually in the Santhal Parganas, it might be necessary to provide the Collector with better machinery. But that was no argument against the policy indicated by these clauses, nor against their introduction in places where the machinery already existed in complete working order, as it did in the Provinces to which the operation of these clauses was more particularly suited.

The Motion was put and agreed to.

The Hon'ble Mr. Hope moved the following amendments:—

That the following clauses be added to section 336:—

"The Local Government may, by notification published in the official Gazette, direct that whenever a judgment-debtor is arrested in execution of a decree for money and brought before the Court under this section, the Court shall inform him that he may apply under chapter XX to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of his application, and if he places all his property in possession of a receiver appointed by the Court.

"If after such publication the judgment-debtor express his intention so to apply, and if he furnish sufficient security that he will appear when called upon, and that he will within one month apply under section 344 to be declared an insolvent, the Court shall release him from arrest:

"But if he fails so to apply, the Court may either direct the security to be realized or commit him to jail in execution of the decree."

He said that the hon'ble mover of the Bill, now under consideration, yesterday expressed the opinion, or at any rate quoted from elsewhere with approval the opinion, that the Indian law with reference to debtor and creditor was the most severe and anomalous in the world. The creditor was able to proceed against the property, not only present but future, and also against the person of the debtor. There was only one small door left open—a door which indeed had been slightly enlarged by the amended form of the present Bill, but which still was an exceedingly small one, he meant the door of the insolvent clauses. Under the Bill as it was now before the Council, a man, if he chose to make a declaration of insolvency, could obtain a release from imprisonment, and if his debt did not exceed a certain small sum the Court could give him his liberty for the future altogether. But it had been proved to be the fact in some parts of India that a very large proportion of debtors were absolutely unacquainted with the existence of this door. In the document which had been so frequently referred to the Report

of the Dekkhan Riots Commission, it was stated of debtors arrested—

"That they may on certain conditions get free, or that the term of imprisonment is not absolutely of unlimited duration and hardship, is also as a rule unknown to them."

And in consequence of that there arose a very large number of evils, which he did not mean to recapitulate, caused by the fear of beiug so imprisoned. The Commission consequently recommended that when a man was brought up before the Court in the first instance on a warrant of arrest, care should be taken that he was made acquainted with this mode by which he could be saved the ignominy which he so excessively dreaded. As regards Bombay this recommendation had considerable force, more than as regards other Proviuces, owing to the large abuse of these powers in that Presidency. It was not an impossible thing for a Subordinate Judge's Court to be eighty or a hundred miles from that of the District Judge or the Civil jail. A man brought before the Subordinate Judge was not only imprisoned, but sent off to a distant jail before in practice he could declare to the Judge his wish to become an insolvent. A large proportiou of these debtors were ignorant people who very seldom left their village and could not take advantage of the insolvency clauses, until they had preformed this long and terrible journey. In order to support their recommendation the Dekkhan Riots Commission pointed out that in 1872, out of 1,877 persons who were imprisoned, only 76 took the benefit of the Insolvent Act. The force of this fact could be best appreciated by bearing in mind another fact, that in 99 cases out of 100 these people had no property whatever. The Commission pointed this out. They said—

"If, as is the case with the agricultural ryot of the Dekkhan, the debtor is a man with an established residence to which he is bound by the strongest ties; if his property is such that it is easily ascertainable and in great measure impossible to conceal; and if such frauds as he may be tempted to commit in order to evade payment are punishable under the criminal law, the necessity for the alternative method of securing his property in payment is reduced to a minimum."

So that we might fairly infer that very large proportion of these 1,800 men who were sent to jail, and who had no property, did not get out simply because they were not aware of the advantage which the law gave them. The object of the amendment therefore was to impose on Courts of first instance the duty of simply in-

forming the debtor that there were these provisions for his avoiding being sent to jail, provided he chose to take advantage of them. And the clauses had, with the assistance of the learned Secretary, been so framed as to give sufficient security against this power being made use of in a fraudulent manner, because it would be necessary, when the debtor expressed his intention to become an insolvent, that he should take the proper steps to do so in a certain time, and if he did not, the security would be debarred. Mr. Hope was well aware that it was one of the practical features of the whole question that there were enormous differences between one part of India and another. On this ground he had, at the suggestion of the hon'ble mover of the Bill, made a slight amendment in the terms of his amendment as it was originally laid before the Council. The effect would be that instead of the clause being applicable to all parts of India, it would only have effect in such districts as the Local Government might think necessary. He trusted that in this modified form, which was designed to ensure the intention of the law being carried out, it would meet with acceptance at the hands of the Council. He trusted also that the case would not be injured by his endeavonr to compress what he had to say into a small compass.

The Hon'ble MAHARAJA JOTINDRA MOHAN TAGORE said that in a country where the *benami* system prevailed to a large extent, the facilities for fraudulent transfers of property were necessarily great, and the dread of imprisonment acted as a wholesome check upon dishonest debtors. If the proposed amendment was accepted, it would in a great measure remove that check; for if every time as a rule the Court were to expound the law of insolvency whenever debtors were brought under arrest, it would in many instances be construed that it had a leaning towards the debtors, and that it was the wish of the Court that the debtors should declare themselves insolvents; the effect would be to encourage indirectley fraudulent transactions over the country. It would be far better to declare openly that there was to be no more imprisonment for debt than that the judgment-creditor should be led to undergo all expense and trouble for the purpose of arresting his debtor, in order that the Court might read to him a homily on Chapter XX of the Code, and then release him from imprisonment. But he saw that the amendment as now proposed to be altered was to be permissive in its character, and he had every hope that the responsible head of the

Bengal Government would never see reason to extend it to Bengal.

The Motion was put and agreed to.

The Hon'ble SIR ARTHUR HOBHOUSE moved that the Bill as amended be passed. He said :—"Before this Bill is dismissed into the outer world with all its imperfections on its head, I have one or two observations to make, but they will not be very long. First, the Council will observe that we propose that it shall come into force on the first of October 1877. That seems a long way off. But it must be remembered that the Bill has to be translated, and many persons have to make themselves acquainted with its contents; and therefore the time proposed is not likely to be found too much. Indeed it is more likely to be found too little, as in the case of the Criminal Procedure Code the operation of which had to be postponed. The intervening time is also very useful in another way, because in the hurry of printing and general hurry of work at the last moment mistakes must be made, which may be found out in the process of translation or the other processes through which an Act has to pass between the time of passing and of coming into operation. Opportunity is thus afforded of introducing amendments before the mistakes have caused inconvenience.

"There is still one section in the Bill connected with the vexed question of sales of land, on which I should like to offer some explanation. This is section 427, my remarks upon which I designedly postponed yesterday, because I thought my hon'ble friend Maharaja Jotindra Mohan Tagore was about to move to expunge it, and I conceived it would be more proper to state then how the Bill stood in that respect. It is the more necessary to explain, because it looks as if it gives the executive some very large powers, whereas in point of fact it does not give them powers much larger than they possess at the present moment. It provides that the Local Government, with the sanction of the Governor-General-in-Council, may make special rules for any local area, imposing conditions in respect of sales of any class of interests in land in execution of decrees for money, where such interests are so uncertain or undetermined as in the opinion of the Local Government to make it impossible to fix their value. In our Bill No. III that provision ran thus, that the Executive Government may make special rules imposing conditions in respect to the sale of land in execution of decrees from money. What was contemplated was that the Local Governments would

make some conditions of the kind which prevail in the Non-Regulation Provinces. We did not at the time see our way to making the rules ourselves, nor did we see our way to do so until we got information from the Local Governments and authorities, particularly the Governments of Bombay and Bengal. Now we have made special rules for ourselves, namely, the rules we have just been discussing. It will therefore not be advisable to leave in the Bill a general power to make rules when we have made rules ourselves, for the power might over-ride the rules made by the Council. But we do give power to make special rules in one particular class of cases. That was proposed in Bill No. IV, and the power was carried further, because it was then said that the Local Governments, acting in concert with the Governor-General-in-Council, may make rules imposing conditions on sales of land or prohibiting sales of land, not only where the interests in such land are uncertain or undetermined, but where for reasons of State the Local Government thinks that such class of interests should not be compulsorily transferable. Now we have left that out of Bill No. V, and we have only given power to make special rules where interests in land are so uncertain or undetermined as to make it impossible to fix their value. With that power and with the clause which enables the executive to transfer the execution of decrees to the Collector, we hope that all cases can be met which we contemplate providing for by legislation. I mentioned at Simla that the power of prohibiting sales was intended to meet cases where the nature of the interests in land was extremely obscure, very valuable to the actual cultivator but worth nothing in the market, and I illustrated the position by reference to what is going on in the Central Provinces. However on consideration we thought that so wide a power need not be given for so limited an object; so the power has been materially cut down, and the provision stands in the simple form in which the Council see it.

" The latter part of the section says that if any special rules for sales of land in execution of decrees are in force in any Province, the Local Government may continue such rules or modify them. That in effect is only a power which the Local Governments in question have already.

" I explained yesterday what alteration was made in the Code almost immediately after it was passed for the purpose of enabling the Local Governments to check indiscriminate sales of land. The

check has been applied in this form, that sales shall not take place without the consent of some executive authority. Of course that consent may be given on any conditions, for the power of withholding it can always be exercised at discretion. These conditions have been specified by different rules in different places. Still there remains the absolute discretion vested in the Government which carries *in gremio* the power of making rules and conditions from time to time. So that the provision I am commenting on really gives no more power than the Local Governments of the territories subject to these special rules possess at the present moment, but only gives them what is given in the Code of 1859 as it was amended within four months after its passing.

"I do not think there is any other point I need bring to the notice of the Council specially."

The Hon'ble MAHARAJAH NARENDRA KRISHNA requested that the remarks which he had made on the 28th March in the course of the debate on the Civil Proceedure Bill be taken to form a part of this day's proceedings.

The Hon'ble Mr. HOPE was sorry to appear again as an offender by taking up the time of the Council, but as he was one of the signatories to the Report of the Select Committee, he thought it only due to himself to state that he had not done so wholly without reservation. One of the ablest, most courteous and most practical among the critics who had given them the benefit of their advice on this Bill, Mr. Justice Turner, had been pleased to designate those who thought as Mr. Hope did as the party of interference. Now he ventured to think that those who interfered were those who innovated, who introduced something new and contrary to all previous custom, and it was evident that Mr. Justice Turner also took the word in that sense. The English might well call themselves interferers in India, and he thought those might justly be called the party of interference, or innovators, who commenced by a law to upset all the relations which had existed between debtor and creditor, for many centuries previously. Those seemed to him properly to be interferers or innovators who first of all introduced the petty details of the English law in the Presidency-towns and produced the results which were so ably sketched in Lord Macaulay's well-known Essay, and those who year by year carried out the same policy in the mufassal, and made our judicial system that minute, elaborate, complicated,

costly and dilatory machine that it was. He did not mean to deny that to a considerable extent the alterations introduced might have been good. There were certain principles which lay at the bottom of all sound law, and their recognition was an advantage which all who had to do with the subject must recognise.

But it seemed to him that the test of all measures was success. If innovation turned out to be a success, then it was called improvement, and all were glad that it should be so. But if it turned out otherwise, then it was naturally and very properly stigmatized as interference. Tried by this test he claimed that the law of the English as to debtors and creditors had been a conspicuous failure, and in proof he would point to the ever-increasing wave of objection which came rolling in. Not only did our public records during the last twenty or thirty years show perpetual differences and discussions and references carried on in almost all the Governments in India between all the highest authorities, but our Statute-book bore the same evidence in the number of special laws which it had been found necessary to introduce,—laws which he saw the critic to whom he referred looked on with regret. The same was also evident in the numerous exceptions which existed in the Civil Procedure Code and which were preserved in the present Bill, such as the exemption of the Punjab and Central Provinces from some of the more important provisions, including even the very power regarding land to which the Hon'ble Maharaja Jotindra Mohan Tagore recently referred. Mr. Justice Turner had been so good as to designate this party of interference as a numerous body of gentlemen, but to deny to them the title of a "school of political thought" Mr. Hope was very content to accept the humbler designation. He was thankful that the number of those who thought with him was large, as admitted by his critic, and that it was increasing. He was not ashamed to be found on the ground of practical action, rather than up among the clouds of imagination, to be driven hither and thither by higher currents. The characteristic of this wave of objection was that it applied to some parts of India and not perhaps with any force at all to other parts of the country. This was naturally to be expected from the wondrous diversity of nations and circumstances, which had been so well described by his hon'ble friend Sir John Strachey, and which led Mr. Bright to propose the division of India into separate provinces

independent of each other. Mr. Hope thought that the proper remedy was to have separate chapters and clauses applicable to different parts of India. In this way we could provide against the risk of enforcing in any place what was not applicable to it. In the course of the sittings in Committee he had been endeavouring to urge these opinions, and he was extremely indebted to the forbearance of his colleagues upon whom he had endeavoured to enforce views in which they could not agree. He had been at a disadvantage owing to the fact that the Dekkhan Commissioners' report was not officially before the Committee, and that its contents were therefore not thoroughly before known except to the hon'ble mover, who took a good deal of trouble to master them.

As regards this question of sales of land in execution of decrees it seemed to him that the proper course was to provide a permissive clause, and that had been done to a certain extent. He could only regret the omission of the clause (327 (*b*) of Bill No. IV.) which allowed the Government to prohibit absolutely sales of land in certain districts. That gave a larger degree of power than the clause which we had succeeded in preserving, and a power which he thought it was fairer to have, on the face of the Statute-book, than the undefined power of at any time upsetting the whole law by some special Act.

As regards what might follow a decree besides touching immoveable property, the most important question was imprisonment for debt. Our law here was most barbarous; it was admitted to be most severe. The enormous evils which that mode of endeavouring to recover property from the debtor were well described in this same report, a report which was not merely a report of the state of circumstances in the Bombay Presidency, but summarised all previous discussions in other parts of India; and it was with regret that he saw that it was not possible to take any advanced step in the present Bill towards the abolition of imprisonment.

He had made these remarks merely to qualify his own signature to the report of the Select Committee. He was aware that in a large number of matters the Bill was an immense improvement, and he was extremely glad that it had fallen to the Hon'ble Mover to complete this work in which he had taken so much interest. Mr. Hope was glad to mark the progress of the views which he had advanced. They derived immense support from the admirable

speech of Sir A. Hobhouse. He was aware that he must trust to time, which as he had remarked on another occasion, had already done so much for law-reform. He only hoped we might not eventually owe their triumph to any popular rising, such as that of the Santhals, or more recently the Dekkhan riots, or to such disturbances as were witnessed by Sir William Muir after the outbreak of 1857, when whole lines of villages were seen in flames, where the villagers had risen and murdered those who had ousted them through the Civil Courts. If he was indulging in any vaticination in looking forward to the ultimate success of his principles, he could only plead the distinguished examples of looking to the future which had been set him during the last few days, and the fact that in the present debate the part of Cassandra had remained unfilled.

The Hon'ble Sir Edward Bayley wished to say a few words on one subject only, namely, the law of imprisonment for debt. He cordially acknowledged the very many improvements which this Bill would introduce into our Civil Procedure. The evidence which was laid before the Council did establish the fact that although the procedure of 1859 was in itself an enormous improvement upon that which preceded it, still it left open several doors by which very great fraud, cruelty and oppression had been practised through the agency of our Courts. The particular instances which had been brought to notice by the Dekkhan Riots Commission were perhaps crucial instances of abuses which had been perpetrated by the agency of the judicial administration of the country. He thought no one could read the evidence given before the Commission without feeling indignant that such things could have taken place under British rule. He did not wonder at the unfortunate men who were subjected to such proceedings rising up in utter despair against their oppressors. He could only say that it redounded very much to their patience and respect for the law, that they proceeded no farther than they did. Some of the measures which the Bill introduced would go, he trusted, far to make impossible such cruelty in the future. But he thought the Riots Commission had satisfactorily shown that the power of imprisonment for debt was one of the agencies which had been most abused, and which had, so abused, most actively contributed to the terrible result which ensued. He himself when he entered into the discussions upon this Bill was quite unprepared to take into consideration the expediency of the abolition

of imprisonment for debt. But he had in the course of those discussions seen the horrible abuses to which that power could be twisted, and he now felt that it was one which was most dangerous and pernicious. He believed himself moreover that it was an utterly unnecessary power. His hon'ble friends, the Native Members of Council, had both spoken of the necessity of retaining it as a remedy against fraud; they spoke no doubt of what they saw as regards their own part of the country. But he believed he was able to oppose to that an authority relating to the same part of the country, which he thought it would be admitted was of no less weight, he meant the learned Advocate General of Bengal, Mr. Paul. That gentleman said :—

"I am an advocate for the abolition of imprisonment for debt, and I entirely concur in and support the views held by the Hon'ble Mr. Hope. During an experience of Mufassal Courts and cases for the last fifteen years, I do not remember meeting with a single case in which I have been engaged where an application have been made for the imprisonment of the debtor, but no doubt there are cases in which such applications have been made and debtors have been imprisoned. I merely refer to my experience as showing that mode of enforcing decrees is not ordinarily pursued, and that its abolition will not entail any serious mischief or harm. I am fully satisfied that the process of imprisonment for debt is resorted to, either as a vindictive measure or as a means to extort money from the relations of the debtor, or to oppress the debtor for some purpose other than obtaining merely the monetary redress covered by the decree."

That opinion had been supported by the Madras Government which had also recently proposed the total abolition of imprisonment for debt, and it fell to him during the operations relating to the proclamation of Her Majesty as Empress, to take an account of the number of petty cases in which prisoners were actually lying in jail for debts of small amount: they were very few—he was surprised to find how few—all over the country. As a matter of fact therefore it was a power which in most parts of the country was hardly used at all, even as the law now existed. As the Bill was framed it had cut down the period of imprisonment so materially that it could no longer act as a deterrent to a man who was inclined to be fraudulent or recalcitrant: the only deterrent effect it could have was upon an honest but unfortunate debtor, and those were not the men to whom it ought to be made applicable.

Sir Edward Bayley therefore announced himself a convert to the doctrine of abolition of imprisonment for debt. Imprisonment for debt was, he felt utterly unsuited to the circumstances of

the country, and it was capable of being applied to the most cruel purposes. He should therefore have considered it his duty, even at this late stage, to move for the omission of the clauses which provided for it in the present Bill, although they had been in some respects modified and made less severe. But there was one particular difficulty connected with its abolition, namely the present state of the law of insolvency. He quite admitted that if imprisonment for debt were abolished, it would be necessary to enter into the consideration of a total reconstruction of the Insolvency law. But that would demand much time and discussion and involve the passing of a very considerable measure. He could not hope that it would be possible to take it into consideration in connection with the present Bill. He did hope however that his learned friend who would succeed Sir Arthur Hobhouse might find leisure at an early period to bring in an amended Code of Insolvency, together with a provision for the total abolition of the practice of imprisonment for debt.

His Excellency THE PRESIDENT said :—" I am reluctant to allow a measure so important as the present Bill to pass into law and become a substantive part of the Indian Statute-book, without at least a word of good speed from the President of this Council.

" But after listening yesterday to the masterly speech of my hon'ble friend Sir Arthur Hobhouse, I felt, what appears to have been felt equally by our hon'ble colleague Sir John Strachey, that that nothing had been left for any of us to say of the slightest practical value on behalf of this Bill.

" I think, indeed, I cannot do better than imitate the judicious example of that civic worthy, I believe he was a Mayor of Liverpool, who, having to speak on some public question after Edmund Burke, condensed his own eloquence into three words, and said, " ditto to Mr. Burke." I say " ditto to Sir Arthur Hobhouse." The same has already been said in a more emphatic form by another hon'ble member of this Council. For, of the six amendments of which he had given notice, my hon'ble friend Maharaja Jotindra Mohun Tagore, after listening to what he justly called the exhaustive statement of my hon'ble colleague, immediately withdrew five, and I think that his withdrawal of these five amendments was a most emphatic ditto to Sir Arther Hobhouse. It is also, I think, creditable to the care with which this Bill has been drafted, or perhaps I should rather say with which it has been considered in Committee, that on the sixth and

only amendment moved by my hon'ble friend the Maharaja, the opinions of the Council were so nicely balanced and so narrowly divided that the amendment was only carried by a single vote, and that vote I believe was my own. I gave it because I thought my hon'ble friend had established his contention that we have before us no sufficient evidence to justify us in withdrawing from a very painstaking body of judicial officers functions which they have hitherto exercised with promising intellegence and discretion.

"My hon'ble colleague, whose modesty takes, I think, a too Sadducean view of the immortility of his fame, disavowed and repudiated all claim to the special connection of his own name with the measure which we hope to pass into law today. But he may, I think, be congratulated,—and I do congratulate him—on the fact that he has been able before leaving India to bequeath to India so valuable a result of his latest labours, which have, I know, been most arduous. And I think that every Member of this Council may also be congratulated on the fact that my hon'ble colleague has bequeathed to us the recollection of one of the most brilliant orations, one of the most lucid, logical, and complete expositions, to which I have ever had the pleasure of listening, even from himself, on all the facts and bearings of a legal question specially important to this country.

"To say the truth I could not help feeling when I listened to what seemed to me his unanswerable arguments, that they would suffice to cover and to justify legislation much more copious and forcible than any which is contained within the four corners of the few and moderate clauses of this Bill which regulate the relations between debtor and creditor.

"And I have no doubt that if hereafter further legislation in the same direction be found necessary, future legislators will refer to the speech of my hon'ble colleague Sir Arthur Hobhouse as a high authority in favor of such legislation. I must frankly confess that if the amendment of my hon'ble friend Sir Edward Bayley had not been carried, as I am thankful to say it has been carried by a nearly unanimous Council, this Bill would have passed into law with what I, for one, should have considered a very serious—indeed, I may say, a very discreditable—defect in it.

"My hon'ble colleague Sir John Strachey most properly and appropriately vindicated the science of political economy from much of the nonsense we so aften hear put forth in its name. Political

economy is simply that science which enables us to understand and to practise the laws which govern the creation and accumulation of wealth. But it has nothing whatever to do with the laws which govern the distribution of wealth. I think that one of the first and most important considerations which practical legislators are bound to bear in mind when dealing with the subject to which the amendment of my hon'ble friend has special reference is, not what are the laws of political economy, but what are the actual facts to which they are to be applied; what are the interests and social circumstances which will be affected by their legislation, and whether those social conditions are of a character which a wise statesman would desire to encourage and possibly to extend, or to restrain and restrict. That being the case, the only objection I have heard made to the amendment of my hon'ble friend is one that surprises me; for it amounts to this, that his amendment, if carried, would have the effect of ridding the community, or at least the community of Bengal, of the existence, or at least the unrestrained activity, of a class which I confess appears to me to be about one of the most worthless, mischievous nuisances by which any community was ever infested—a class of needy usurers who have no capital of their own, who borrow at one rate of interest in order to invest their borrowed money at a higher rate, in speculating on the plunder of the agricultural community. I do not think it is necessary further to notice such an objection.

"I had also great satisfaction in voting for the amendment of hon'ble friend Mr. Hope. I entirely concur in the principle embodied in that amendment. My hon'ble friend referred to Mr. Justice Turner in terms which were not exactly those of appreciation. But I am quite certain that whatever may be thought of the abstract views and opinions of Mr. Justice Turner, every one who has practically had to do with the preparation of this Bill must feel that it is indebted to Mr. Turner for most valuable assistance; and I think it is fair to record the fact that to the revision of this Code he has sacrificed not only much valuable time, but also much hard-earned leisure.

"I am sure that I only express the feelings of all my colleagues when I add to those of Sir Arthur Hobhouse the expression of our collective thanks for the care and thought and consummate knowledge of statute law, which have been bestowed upon the preparation

of this Bill by my friend Mr. Stokes, whom we shall all be proud to welcome to his well-won place at the head of that great department of our Government with which he has been so long and so worthily associated. I also beg to join in the tribute of gratitude so eloquently rendered by Sir Arthur Hobhouse, to my honourable friend Mr. Cockerell, to the Chief Justice Sir Richard Garth, and many other high judicial authorities, as well as to all the Local Governments, on behalf of this Bill.

"This Code of Civil Proceedure, which we hope to pass into law to-day, may at first sight seem to constitute an enormous addition to the Indian Statute-book, but an examination of its details will show that, although the body of the Code contains no less than 652 sections, it repeals as many as 575 sections of other enactments. Therefore the addition made by it to our Statute-book represents only about 70 sections. But although this addition is not enormous, it is, I think, important, for it provides for many matters which have hitherto been, either not at all or inadequately provided for. It provides, for instance, for interrogatories, affidavits, foreign judgments, *lis pendens*, admission of documents, administration-suits, suits for dissolution of partnership, insolvency, commissions to make partitions, suits by and against minors and lunatics, interpleader, suits relating to public charities, and several others, amongst which I may specially mention suits against foreign Rulers, section 433. This last-named section of the Code will, I have no doubt, prove generally satisfactory to Native Chiefs, or Princes, carrying on commercial relations with British subjects, as it supersedes the present unsatisfactory manner of adjusting disputes in such cases, and provides certain and easily accessible remedies for breach of contract. The other sections of the Code which have been so lucidly explained by my hon'ble friend Sir Arthur Hobhouse, do not call for any special remark on my part. In attempting to deal comprehensively with questions so numerous and interests so various as those to which the present Code will be applicable, no Government can flatter itself that it has not made any important omissions, and we do not suppose that the law we hope to pass to-day may not be susceptible of improvment by future amendments.

"The framing of such a Code as this requires more than the science of the lawyer—more than the skill of the draftsman. It demands also that intimate knowledge of local peculiarities of prac-

tice and custom, and that familiarity with the practical working of existing laws, which are specially possessed by the European and Native Judges in the Mufassal, and by the executive officers of the Local Governments. From all these, prolonged assistance has been received, and to all these our final thanks are due.

"It may indeed be said that the whole legislative and administrative machinery of India has, for a lengthened period, been at work upon the Bill before us, and my trust is that the Council will now concur in ratifying the result of so much labour, thought, and knowledge."

The Motion was put and agreed to.

SOURCES OF HINDU LAW.

(COMMUNICATED.)

ACCORDING to the belief of the Hindus, their laws, both religious and municipal, are equally founded upon revelation and inspiration. They consist of two portions of which one preserved in the very words of revelation is called Sruti, and the other recorded by persons under inspiration who commemorated revelation is designated Smriti. The former means audition, while the latter signifies recollection. The one is contra-distinguished from the other.

The Sruti is the revealed or traditional law, and is held in the highest estimation by the Hindus to be their Holy Script. It is their supreme religious authority to which appeal is made on solemn occasions, and forms the ground-work of all religious institutions. It constitutes the four Vedas, Sama, Rig, Yajur and Atharva which principally treat of religion, but rarely deal with topics of purely legal nature.

The Smriti is the remembered law, and recites the sense of the doctrines inculcated by the Great Deity either in His own words or some other equivalent expressions. It contains sacred precepts reduced to writing by inspired personages, and presumed to have a divine sanction.

Both the religious and the municipal laws of the Hindus are treated in the Smriti. The former comprises rituals and religious observances which have been classified under separate heads. The rituals, both ancient and modern, are denominated Kalpa or Padhati. The latter includes the civil and criminal regulations.

The Smriti is divided into three Adhyayas (books,) or Kandas (sections,) namely:—Achara (ritual,) Vyavahara (jurisprudence,) and Prayaschitta (expiation.)

The Achara Adhyaya or Kanda treats of ceremonies, observances and rites. It prescribes rules for the performance of religious, moral and social duties of four castes, the Brahmana, Kshatriya, Vaisya and Sudra.

The Vyavahara Adhyaya or Kanda deals with civil acts and mutual dealings of persons. It comprises rules of private acts and controversies, as well as of administrative law.

The Prayaschitta Adhyaya or Kanda lays down rules of penance for sinful acts, and dwells at length upon the retribution which is undergone by sin both in this world and the next.

The Smriti, which is otherwise known by the designation of Dharma Shastra, comprehends the general body of religious and ceremonial observances, of moral duties, and of municipal law.

The Dharma Shastra has been divided into three classes;—I. Smritis or Text-Books. II. Vyakhyana or Commentaries. III. Nibandhana Grantha or Digests.

The Text-Books, Commentaries, and Digests are respectively the ancient, mediæval, and modern works on Hindu Law, all of which are written in the Sanscrit language. They are considered to be the original authorities on Hindu Law.

To the above mentioned three divisions of the Dharma Shastra may be added two other classes of works on Hindu Law which are chiefly derived from them, and are now fully recognized as authorities. These are English Works on Hindu Law, and Forensic Decisions on Hindu Law. Both of them are recent and second-hand.

The authorities of Hindu Law may, therefore, be conveniently arranged under five distinct heads :—I. Text Books. II. Commentaries. III. Digests. IV. English Works on Hindu Law. V. Forensic Decisions on Hindu Law.

The Text-Books of Hindu Law are the original Smritis written or said to have been composed by holy sages of antiquity. They are not now regarded as conclusive but corroborative authorities.

The Commentaries on the Text-Books are deemed as authorities next to the texts commented upon as far as their interpretation goes. The glosses which merely explain the text are considered to be of no final authority at the present day. But the commentaries which generally expound the law are respected as final authorities.

The Digests comprise the entire system of law or a portion of the same compiled from the Text-Books and their Commentaries with necessary comments. They are the leading authorities on Hindu Law.

Many Commentaries on, and several Digests of, the Text-Books originated with the rise of different dynasties in India, and declined with their decline. These works once gave the law of the territories governed by the dynasties.

The English Works on Hindu Law have been composed or compiled by European and Native writers. They profess to treat in a somewhat systematic form the Law as laid down in the original Hindu Law Books of ordinary use. They are looked upon in the light of authorities, and have already secured a place in the Library of the Indian Lawyer.

Forensic Decisions on Hindu Law are judgments passed by Court of Law in cases involving different points of the law. Their number is daily increasing. In point of practical utility Forensic Decisions are now-a-days held by judicial functionaries and legal practitioners as the first class of the authorities on Hindu Law, Judicial rulings are in fact the illustrations of the priniciples of law.

I.—Text Books.

In the beginning of the creation the Supreme Being taught laws to Swayambhuva Menu who himself recollected and instructed them to ten sacred sages, Marichi, Atri, Angiras, Pulastya, Pulaha, Kratu, Pracheta, Vasishta, Bhrigu and Narada. These holy personages are reverentially styled lords of created beings. For the promulgation of the said laws Menu appointed his son Bhrigu who on his part communicated them to all the Rishis.

After the plan of the supreme legislative assembly presided over by the venerable sage Bhrigu who rehearsed the Laws of Menu, several other legislative councils were established in course of time in different parts of India, and headed by pre-eminent saints selected by the said assemblies.

In the absence of authoritative annals of Hindu legislation it is very difficult to trace accurately the precise localities and exact periods of the holding of several legislative assemblies, or ascertain their respective presidents and proceedings.

The Hindu legislators have been grouped under two classes:—Ancient or Primitive, and Modern.

Ancient lawgivers were holy sages of the Brahminical class who assumed legislative authority. The peculiar traits which were possessed by them for the qualification of their eligibility to the office of legislators were their abstinence from worldly desires and sensual gratification, absolute self-denial, profound devotion to religious and other laudable pursuits, free association with other classes, and ability of understanding the feelings and notions of

the people for whom they legislated. They performed to the best of their belief the task of legislation, and enacted such laws as were deemed requisite for the regulation and well-being of the community.

Modern legislators who were also of the sacerdotal tribe were for the most part competent and talented ministers or officers attached to the courts of the modern Hindu sovereigns, whose sovereignty ceased of late, for the purpose of regulating the laws of their territories. Their legislation was mainly confined to the expression of their opinions on such portions of the ancient legislative enactments as were best suited to meet the wants of their days. They were the mouthpiece of their employers and did what they had been directed to do. These lawgivers are the real authors of several Digests of which some have taken their titles from the writers' patrons.

The objection taken by some writers to the legislation of the Hindu legislators not being uniform among the different castes is untenable; for uniformity of legislation can never be expected even from the legislature of an enlightened nation composed of persons of diverse manners and customs.

The number of the ancient Hindu lawgivers varies according to the different lists of different writers, and is even rendered uncertain by the redactions of the names of some legislators. The redactions are Vriddha, Vrihat, Madhyama and Laghu.

The following is an alphabetical list of the primitive Hindu legislators with redactions, which has been prepared from the various lists given by several Native as well as European writers.

1. Agni.
2. Angiras (three redactions: A., Madhyama A., and Vrihat A.)
3. Apastamba.
4. Ashwalayana.
5. Atreya.
6. Atri.
7. Bhaguri.
8. Bharadwaja.
9. Bhrigu.
10. Boudhayana.
11. Buddha.
12. Chhágaleya.
13. Chyavana.
14. Cidambara.
15. Daksha.
16. Datta.
17. Devala.
18. Dhoumya.

19. Gargya.
20. Goutama (two redactions: G., and Vriddha G.)
21. Harita (three redactions: H., Vriddha H., and Vrihat H.)
22. Jabáli.
23. Jatukarana.
24. Kanva.
25. Kapila.
26. Kashyapa.
27. Katyayana (two redactions: K., and Vriddha K.)
28. Krishnajini.
29. Kuthumi.
30. Likhita.
31. Lohita.
32. Lokakshi.
33. Marichi.
34. Markandeya.
35. Menu (three reductions: M., Vriddha M., and Vrihat M.)
36. Naciketu.
37. Narada.
38. Parásara.
39. Paraskara.
40. Pitámaha.
41. Poithinashi.
42. Pracheta (two redactions: P., and Vrihat P.)
43. Prajapati.
44. Pulastya (two redactions: P., and Laghu P.)
45. Rishisringa.
46. Samvarta (two redactions: S., and Vrihat S.)
47. Sandilya.
48. Sankha.
49. Santanu.
50. Satatapa (three redactions: S., Vriddha S., and Vrihat S.)
51. Satayana.
52. Satyavrata.
53. Saunaka.
54. Soma.
55. Sumantu.
56. Ushana.
57. Vasishta (three redactions: V., Vriddha V., and Vrihat V.)
58. Vatsa.
59. Vishnu (three redactions: V., Vriddha V., and Vrihat V.)
60. Vishwamitra.
61. Vrihaspati (two redactions: V., and Vrihat V.)
62. Vyaghra.
63. Vyasa (two redactions: V., and Vrihat V.)
64. Wamun.
65. Yajnavalkya (three redactions: Y., Vriddha Y., and Vrihat Y.)
66. Yama (two redactions: Y., and Vrihat Y.)

The Puranas, which treat of heroic history and mythology, are the only available sources through which the birth and actions of the ancient Hindu legislators may be very faintly known.

The ancient Hindu Law is chiefly to be found in the collections technically termed Sanhitas or institutes, of which the authorship

has been ascribed to the abovementioned sacred sages. The authenticity of these works is implicitly acknowledged by the Hindus.

It is the opinion of the best glossators that the Sanhitas bearing the names of the aforesaid saints have been probably recorded from their verbal instructions by their disciples. The mode in which the institutes are written corroborates in a great degree the assertion of the commentators. Instance the Achara Kandas of the Sanhitas of Yajnavalkya and Parasara who are even named in their own lists of legislators given therein.

The institutes of Menu, Atri, Vishnu, Harita, Yajnavalkya, Ushana, Angiras, Yama, Apastamba, Samvarta, Katyayana, Vrihaspati, Parasara, Vyasa, Sankha, Likhita, Daksha, Goutama, Satatapa and Vasishta are considered by some writers to be of superior authority, and termed Smriti, while the Sanhitas of other lawgivers are deemed to be of inferior authority, and designated Upasmriti. This distinction is nowhere maintained in practice. Both the classes are equally imperfect at the present day.

Parasara ordains in his Sanhita that the Ordinances of Menu, Goutama, Sankha and Likhita as well as of his (Parasara's) own are respectively appropriate to the Krita or Satya (first,) the Treta (second,) the Dwapara (third,) and the Kali (fourth or present) Yuga or age. It does not at all appear that this distinction has been really or practically observed in any age. All and every one of the ancient lawgivers are equally venerated next to Menu in point of authority.

The Institutes of Parasara which, if it be conceded, were specially composed for this age and intended to be applicable to it, could not but be highly appreciated by the legal public, were not the Vyavahara branch of his Smriti wanting.

Many treatises are attributed to the same sage. They are called his greater (Vrihat) or less (Laghu) Sanhita, or a later work of the writer, when old (Vriddha).

Generally speaking, the Sanhitas of the ancient Hindu legislators are not of considerable bulk. They are for the most part devoted to religious ceremonies and daily observances, but incidentally treat of legal topics.

The complete works of all the venerable sages with the exception of Menu have not been duly preserved from the ravages of time. But fragments of their writings which escaped from the

depredations of time have come down to the present generation.

The extant Text-Books of the holy sages other than that of Menu do not treat of all kinds of subjects. They are confined to the discussion of such topics as are connected with the Smriti only, and differ from the work of Menu in a few instances both in the nature of doctrine and form.

The Smritis which are no longer extant, are occasionally alluded to or cited by many writers of the Digests.

The exact periods of the composition of the Text Books are not easily ascertainable owing to the absence of genuine Indian chronology. But historical and positive proofs are the only criteria for the correct determination of the age of the Sanhitas.

Menu is described in his Sanhita to have sprung from the Self-Existent Being, and is, therefore, known Swayambhuva. He was the grandson of Brahma, and the first progenitor of the human race. Swayambhuva Menu was the primeval and supreme lawgiver of the Hindus. He flourished in the beginning of the world. From him originally descended six personages styled six Menus who were followed by seven more of the same designation who ruled the mundane regions. The place as well as the length of time he lived are not at all known.

The Sanhita of Menu denominated Manava Dharma Shastra is the most ancient of the written laws of the Hindus. It is held in all ages with profound veneration after the Vedas in holiness, and forms the basis of the Dharma Shastras of the other legislators. They follow Menu in model, and cite him as their undeniable authority. The Ordinances of Menu were regarded by them with so much reverence that no portion of their own institutes which is incongruous to his was to be respected.

The Manava Dharma Shastra treats of all kinds of topics connected more or less with the Dharma Shastra. It dwells upon cosmogony, metaphysics, ethics, rituals, expiation, jurisprudence, politics, commerce, military affairs, metamsychosis, future world as well as other curious and interesting matters.

The Laws of Brahma are said to have been reproduced by Menu in one hundred thousand couplets classified under twenty-four heads in one thousand chapters. This reproduction was made over to Narada who abridged it in twelve thousand verses, and delivered

the abridgment to Sumati, son of Bhrigu. Narada's epitome was again abridged by Sumati in four thousand couplets. The extant Manava Dharma Shastra which consists of two thousand six hundred and eighty-five verses in twelve chapters is a portion of Sumati's epitome, and is termed the Laghu Menu Sanhita or the less institutes of Menu.

The Code of Menu is entirely wanting in method and arrangement. The disarrangement is more the result of accident than that of design.

The Institutes of Menu are now viewed as a work of veneration except in the Presidency of Bombay where they are implicitly followed.

The antiquity of the Manava Dharma Shastra has been acknowledged everywhere. But the precise date of its composition is not correctly given by any scholar, whether European or Indian.

The estimate formed of the age of Menu's Code by Messrs. Chezy, Deslongchamps, Elphinstone, Jones, Schlegel and Wilson varies from the thirteenth to the fourth century before the birth of Christ. The date of the promulgation of the Laws of Menu, must, however, be considered to be coeval with that of the world on the authority of the Manava Dharma Shastra, if believed.

Irrespective of the blemishes of the Institutes of Menu, the work is distinguished for its very great antiquity, celebrity and classic beauty, and has undergone several editions and versions from many oriental scholars.

In 1813 the Sanscrit Text of the Menu Sanhita with Kulluka Bhatta's gloss which will be hereafter noticed under the head of Commentaries was published in the Devanagri character at Calcutta.

Mr. (afterwards Sir) Graves Chamney Haughton, Professor of Hindu Literature in the East India College, edited the original Text of the Manava Dharma Shastra which was printed at London in 1825.

The Laws of Menu in Sanscrit were edited by the French scholar Monsieur Loiseleur Deslongchamps, and published in Paris in 1830.

In 1833 an edition of the original Institutes of Menu appeared in Bengali type in Calcutta.

The first three books of the Sanscrit Code of Menu by an anonymous writer, (whose name as learnt from a reliable source

is Tarachand Chakravarti) were printed in the Devanagri and Bengali characters at Calcutta. A literal Bengali translation of the said books is given with a few notes in Bengali appended thereto. The work made its appearance in 1833.

The original Text of Menu, together with the commentary of Kulluka Bhatta, in Bengali type, followed by a Bengali version, was published in Calcutta.

The earliest English translation of the Sanscrit Text of the Manava Dharma Shastra appeared from the pen of Sir William Jones, the most distinguished linguist, and the Chief Justice of the late Supreme Court of Bengal. The version is preceded by a learned preface, and is generally regarded the masterpiece of the learned translator. "It is" says Mr. Burnell, "far from exact, and is elegant rather than critical." Dr. Goldstucker seems to be of the same opinion.

The translation of the Institutes of Menu by Sir William Jones was first published in Calcutta in 1794, and again in 1796. It is also incorporated in his works published by Lord Teignmouth.

A revised edition of Sir William Jones' version of the Manava Dharma Shastra, with elucidatory notes, by Mr. G. C. Haughton was printed at London in 1825.

In 1833 Sir William Jones' translation of the first three books of Menu's Ordinances, accompanied by a revised English version of the same, with foot notes in English added for the justification of the divergence, appeared in the edition of the Menu Sanhita by Baboo Tarachand Chakravarti. The accuracy of the revised translation is far from being questioned by Dr. Goldstucker who considers the translator to be a very competent scholar.

The third edition of Sir William Jones' version of the Manava Dharma Shastra by the Reverend P. Percival was published in Madras.

Mr. Standish Grove Grady, Reader on Hindu, Mahomedan and Indian Law to the Inns of Court edited Sir William Jones' translation of the Laws of Menu as compared and revised by Mr. G. C. Haughton. A preface and a copious index are respectively given at the outset and close of the work. This edition was issued at London in 1869.

Mr. D. Richardson translated into English from the Burmese dialect the Institutes of Menu under the title of Damathal.

The Code of Menu was rendered from the original into the German language by Mr. Huttner in 1797.

Monsieur Loiseleur Deslongchamps presented to the European world a French translation of the Laws of Menu. The version was published in Paris in 1833.

The English translations of the several texts of Menu, occurring in the various Digests of Hindu Law, by different scholars of Europe and India, are at variance with those by Sir William Jones. Instances of this conflict have been partially noticed by Dr. Goldstucker.

Yajnavalkya is described in the Introduction to his Sanhita as the grandson of Vishwamitra, and is said to have delivered *extempore* his precepts to an audience of Munis at Mithila.

Next in point of importance to the Manava Dharma Shastra is the Sanhita of Yajnavalkya. It treats of Ritual, Law, and Expiation in one thousand and twenty-three couplets, and excels the Institutes of Menu in conciseness of arrangement.

The Text of Yajnavalkya with its well-known commentary entitled Mitacshara, which is to to be noticed under the head of Commentaries, is the nearly universal authority in India.

The age of Yajnavalkya's Code has not been definitely determined. But its earliest date is conjectured to be the middle of the first century after Christ.

In the years 1812 and 1829 the original Text of Yajnavalkya, with its gloss Mitacshara, was respectively published in the Devanagri character at Calcutta.

The Sanhita of Yajnavalkya appeared in the Devanagri character in Calcutta during the years 1840 to 1845.

Sri Bhavani Charana Vandyapadhyaya edited the Sanscrit Text of Yajnavalkya, and published the same in Bengali type at Calcutta.

Dr. A. F. Stenzler of Breslau is the editor of an edition of the Smriti of Yajnavalkya. The work contains marginal notes showing the similar passages of the Institutes of Menu. This mode of arrangement is extremely useful to the reader in the comparison of the doctrines propounded by the two great lawgivers. A German

translation of the original Code is also given in this edition. The book was printed at Berlin in the year 1849.

A select portion of the Achara Kanda as well as the entire Vyavahara Kanda of the Dharma Shastra of Yajnavalkya were translated from Sanscrit into English by Dr. Edward Roer, and Mr. William Austin Montriou of the Calcutta Bar. Under the title of Hindu Law and Judicature the translation was published in Calcutta in 1859. It abounds with many useful and learned annotations. A preface, an interesting introduction, and an index are all to be found in their proper places.

The English version of Yajnavalkya's text cited in the several Digests of Hindn Law translated by the oriental scholars is not only conflicting, but also inconsistent with what has been rendered by Messrs. Roer and Montriou.

Angiras, one of the ten lords of created beings, was according to the Bhagavata the father of Utathya and Vrihaspati, and flourished during the reign of the seond Menu. He composed a concise tract consisting of seventy verses.

Apastamba wrote a treatise in prose as well as a metrical epitome of the same. He is also the author of Sutra named after him.

Ashwalayana is said to have written a work on religious acts and ceremonial observances. He is also known for his treatise on Sutra which generally treats of Fire-sacrifice in worship of deities, and performance of purifying ceremonies.

Atri holds a place among the ten lords of created beings. He was the father of Datta *alias* Dattatreya, Durvasa, and Soma, and wrote a metrical tract which is distinguished for perspicuity. His work is an epitome of the Manava Dharma Shastra. It is very ancient and generally known.

The Sanscrit Text of Atri has been edited by Sri Bhavani Charana Vandyopadhyaya, and printed in the Bengali character at Calcutta.

Bhrigu was one of the ten lords of created beings. He was the promulgator of Menu's Ordinances, and one of his sons known by the epithet 'son Brahma.' A Text-Book is attributed to him.

There were two sages who bore the name of Daksha: one was son of Brahma known by the name of Prachita and occupied a place among the ten lords of created beings, while the other was

grandson of Prachina Varahisha. It seems, therefore, extremely doubtful which of them was the lawgiver. The authorship of a metrical tract on law is, however ascribed to Daksha.

Agreeably to one legend Devala was son of Vishwamitra and grand sire of the distinguished grammarian Panini ; but according to another he was the great-grandson of Daksha. He is the author of a Sanhita.

Gargya was the son of the well-known astronomer Gargya. He is said to have composed a Text-Book.

Goutama, son of Gotama, who founded a rational system of logic and metaphysics, wrote an excellent treatise on law. Although his name is mentioned in every list of lawgivers, texts are often quoted in his father's name. The Sanhita attributed to Goutama is more developed than the institutes of any other venerable sage.

Harita wrote a treatise in prose. A metrical epitome of his work is also extant.

Kashyapa, son of Marichi, is the writer of a Sanhita.

Katyayana composed a law tract which is not only complete, but also lucid.

Likhita, brother of Sankha, is the author of a metrical treatise. Both the brothers conjointly composed a treatise in prose which has also been epitomized in metre.

Marichi was one of the ten lords of created beings, and father of Kashyapa. A Sanhita is ascribed to him.

Narada occupies a place among the ten lords of created beings. He was begotten by Brahma and again by Kashyapa on Daksha's wife. He was the sage among gods, and composed a Sanhita of which a portion is extant.

Parasara, grandson of Vasishta, wrote a treatise consisting of the Achara and the Prayaschitta Kandas in five hundred verses.

The original Sanhita of Parasara has undergone an edition from the pen of Sri Bhavani Charana Vandyopadhyaya. It has been printed in Bengali type at Calcutta.

Prachita, son of Prachina Varahisha by a daughter of the Ocean, is said to have written on the Dharma Shastra.

Pulastya, ranked among the ten lords of created beings, was the father of Agastya. He composed a Text-Book.

Of the Sanhita of Samvarta an epitome in verse is available.

Sankha, brother of Likhita, is the author of a metrical treatise written in eighteen chapters. The joint composition of the two brothers and their separate works are considered as one work. Sri Bhavani Charana Vandyopadhyaya published in the Bengali character an edition of the original Sanhita of Sankha in Calcutta.

Satatapa wrote a tract on expiation and penance of which a metrical epitome is extant.

Ushana *alias* Shukra, grandson of Bhrigu, is the regent of the planet Venus. His metrical institutes and an epitome of the same are both extant.

Vasishta, one of the ten lords of created beings, and preceptor of the inferior gods, is the author of an excellent treatise in prose and verse.

Visanu was an ancient sacred sage who must not be confounded with the Indian Divinity Vishnu. He is the reputed writer of an elegant metrical work on law of which an epitome is also extant. The Institutes of Vishnu entitled Bhagavat Vishnu Sanhita contain one hundred chapters.

The original text of Vishnu has been edited and published by Sri Bhavani Charana Vandyapadhyaya in Bengali type at Calcutta.

Vishwamitra, grandfather of the illustrious Yajnavalkya, was originally of the Kshatriya caste. He was a sage of the military class, and subsequently became a Brahmana on account of his profound devotion. He is mentioned as the author of a Sanhita.

Vrihaspati was according to one legend son of Angiras, but according to another son of Devala. He is the regent of the planet Jupiter. He wrote a code of which an epitome is extant.

Vyasa, son of Parasara, and the reputed author of the Puranas, composed some legal treatises.

Wamun, a Brahmana Rishi of Hindustan, wrote a tract on Achara, Vyavahara and Prayaschitta.

Yama, brother of the seventh Menu, and governor of the world below, is the author of a concise treatise in one hundred couplets.

In 1845 the original Texts of the holy sages Angiras, Apastamba, Atri, Daksha, Goutama, Harita, Katyayana, Likhita, Parasara, Samvarta, Sankha, Satatapa, Ushana, Vasishta, Vishnu, Vrihaspati, Vyasa, Yajnavalkya and Yama were printed in the Devanagri character at Calcutta.

According to the Bengal jurist Pandit Bhavasankara Vidyaratna the Institutes of the thirty seven legislators, Angiras, Apastamba, Atri, Bhrigu, Bondhayana, Daksha, Devala, Gargya, Goutama, Harita, Jabali, Kashyapa, Katyayana, Kuthumi, Likhita, Lokakshi, Marichi, Menu, Narada, Parasara, Paraskara, Poithinashi, Prachita, Pulastya, Rishisringa, Samvarta, Sankha, Satatapa, Sumantu, Ushana, Vasishta, Vishnu, Vishwamitra, Vrihaspati, Vyasa, Yajnavalkya and Yama are all compiled in the collection termed Shattrinshun Mathung.

The Dharma Shastra of the five lawgivers Chhagaleya, Chyavana, Jatukarana, Pitamaha and Prajapati are considered by Professor Stenzler to be extant from his having personally met with citations from all of them.

Besides the abovementioned Sanhitas there are some texts, if not, the entire institutes, of the remaining legislators with the exception of a very few. The fragmentary texts are occasionally quoted in the Glosses and Digests of Hindu Law.

Except the English translations of the Manava Dharma Shastra and the Institutes of Yajnavalkya, which have been previously noticed in their respective places, no regular version of the text of the Smritis of any other scared sages has yet been rendered in English. But the detached rendering of a few texts of one or the other of these lawgivers cited in such Commentaries and Digests as have been translated into English only is noticeable. Disagreement in the several versions of the same text of any of the aforesaid Rishis is even observable, and has been partly pointed out by Dr. Goldstucker.

The Sanhitas of the ancient lawgivers have been recognized to be the independent authorities and sources of Hindu Law.

The precepts of the Smritis have, however, been interfered with by usage, and their language has been rendered obscure by time. For the true exposition of the law laid down in the several Sanhitas recourse must be had to the various Commentaries and Digests which are now looked upon as the repositories of Hindu Law. The lastmentioned works are more specially referred to for the determination of the disputed points of the law.

NEW LIMITATION ACT.

Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vic., Cap. 67.

The Council met at Simla on Thursday, the 19th July 1877.

Present: His Excellency the Viceroy and Governor General of India, G.M.S.I., *presiding*, His Honour the Lieutenant-Governor of the Panjab, C.S.I., the Hon'ble Sir E. C. Bayley, K.C.S.I., the Hon'ble Sir A. J. Arbuthnot, K.C.S.I., Colonel the Hon'ble Sir Andrew Clarke, R. E., K.C.M.G., C.B., Major-General the Hon'ble Sir E. B. Johnson, K.C.B., the Hon'ble Whitley Stokes, C.S.I., the Hon'ble T. C. Hope, C.S.I., the Hon'ble F. R. Cockerell, and the Hon'ble B. W. Colvin.

The Hon'ble Mr. Stokes moved that the Reports of the Select Committee on the Bill for the limitation of suits and for other purposes be taken into consideration. He said that under ordinary circumstances, he would not have made this motion until the Council had returned to Calcutta. For the Bill dealt with the whole range of civil litigation in India, and the Government desired that Bills of so wide a scope should always, if possible, be passed at the winter sittings. But as the Bill provided expressly for several proceedings under the new Code of Civil Procedure (see, for instance, Section 14, clause 2 and Schedule 11; Nos. 11, 153, 160, 161, 169, 172, 174, 175) which were not provided for by Act IX. of 1871 it should come into force contemporaneously with that Code, that was to say, on the 1st of October 1877; and it should be passed and promulgated a sufficient time before that day to enable the new Act to be translated into the native languages and the public to become acquainted with its provisions. Moreover, the Bill had been carefully revised in Calcutta by a committee composed of Sir Arthur Hobhouse, Sir Edward Bayley, Mr. Cockerell and Maharaja Jotindra Mohan Tagore, who concurred in recommending that the Bill, as then settled, should be passed; the revised Bill was published, in order to elicit criticism in the *Gazettee* of 31st March; few criticisms had since been received; few alterations in substance had since been made, and of these none, as Mr. Stokes thought the Council would admit, were of sufficient importance to require that the Bill should be republished and its passage postponed.

The first of these alterations was the omission, in section 6, of the paragraph which excluded from the provisions of the Limitation Act appeals from, and applications to review, decrees and orders of the High Courts in the exercise of their original jurisdiction. These appeals and applications were now regulated, in the case of the High Courts at Calcutta, Madras and Bombay, by rules made under the Charters of 1865. But, in the opinion of Mr. Justice Macpherson, there could be no possible reason for excluding them from the operation of the Limitation Act. Moreover, as Mr. Justice Kennedy had observed in his brief but valuable criticisms on the Bill.—

"There are many inconveniences in the present rule in the Calcutta High Court. The time for appeal now runs from the date of pronouncing the judgment, not from the day of the decree being passed. I think that this ought to be altered, as the effect of the judgment is not unfrequently mistaken until the decree is finally settled. Also the time for obtaining a copy of the judgment ought, as in the Mufassal, to be excluded; there is no refresher allowed for attendance to hear judgment, and, in the case of a written judgment espec ially, it is not always possible for Counsel to be sure what has been decided by the Bench, even if they be present in Courts constructed on such wretched acoustic principles as are those here."

We had therefore provided, in accordance with the opinion of Sir Richard Garth, Mr. Justice Macpherson and Mr. Justice Kennedy, that the period for such appeals and applications should be twenty days (the period allowed for appeals from decrees by the present practice of the High Courts at Fort William and Bombay) from the date of the decree or order. The period allowed for appeals from orders was in the Bombay High Court twenty days, in the Calcutta High Court four days. We had followed the Bombay rule in this respect. Mr. Justice Kennedy saw no objection to our doing so, and Sir Michael Westropp had informed Mr. Stokes that, in the High Court at Bombay, the rule had worked very well. In computing these periods of twenty days, the time requisite for obtaining a copy of the decree appealed against or sought to be reviewed and of the judgment on which it was founded would under section 12, be excluded, and, under section 5, the Court would have power, in roper cases, to enlarge the period. The High Court at Allahabad had ordinary original civil jurisdiction. But the period for appeals from,

and applications to review, decrees made in the exercise of its extraordinary original civil jurisdiction would, under Nos. 15 and 173 of the Second Schedule to the Bill, be ninety days, the period fixed under its present rules.

Under section 7 of the Bill, where a person entitled to institute a suit was a minor at the time from which the period of limitation was to be reckoned, he was entitled to institute the suit within the same period after he attained majority as would otherwise have been allowed from the time at which the cause of action arose. At the recommendation of Mr. Justice Turner and of Sayyid Mahmud, an Advocate of the North Western Provinces High Court, the distinguished son of a most distinguished father, we had excluded from this section suits to enforce a right of pre-emption. Sayyid Mahmud observed that "the limitation of one year for a claim of pre-emption is perhaps not unduly long if the pre-emptor is not under legal disability at the time of the sale. But this period can at any time be extended indefinitely, a circumstance which not only works a great hardship upon the vendor but also upon the vendee." Then, after citing a judgment of Mr. Justice Turner (Indian Law Reports, 1 All. 207) as to the evils resulting from the right of pre-emption, and quoting the Hedaya, he concluded by expressing an opinion that, under Muhammadan law, the limitation for a claim of pre-emption was considerably less than one year, and that it was doubtful whether the right of pre-emption was ever intended to be conferred upon persons suffering from a legal disability at the time of sale. Mr. J. W. Smyth, now one of the Judges of the Panjab Chief Court, also recommended that pre-emption suits should be excluded from the operation of section 7, on the ground that—" it would be an intolerable evil to allow a person, a minor at the date of the sale, to come into Court, it may be ten or fifteen years afterwards, and ask to have the sale transferred to him. The evil is not so much felt in provinces where the strict Muhammadan law of pre-emption applies, and where, unless a claim is at once made with certain forms, the right is forfeited. But in the Panjab no preliminary form of claim need be gone through (*vide* Act IV. of 1872, sections 9 *et seq*) ; and here a vendee of land may be kept for years in suspense, in fact till a year after all persons in a village who were minors at the time of sale have attained their majority. The mere statement of the case in this way is sufficient to show the absurdity of the rule as it affects pre-emption cases.

We have altered section 10 and the second Schedule in accordance with a suggestion of Mr. Justice Green, one of the Judges of the Bombay High Court, so as to preclude the litigation likely to arise from the use of the words "good faith," and to protect a purchaser for valuable consideration from an express trustee, whether the purchaser had or had not notice of the trust at the time of the purchase. In this respect, our law would then agree with the present English law of limitation (3 and 4 Wm. IV., c. 27, sections 2, 24, 25), save that the lapse of time necessary to give protection would be twelve instead of twenty years; and this difference would disappear on the 1st January 1879, when the statute 37 and 38 Vic., c. 57, would come into force.

Section 14 of the present law excluded the time of a defendant's absence from British India, unless service of a summons to appear and answer could, during such absence, be made under the Code of Civil Procedure. But the Calcutta Trades Association, from whom we had received some practical remarks on the Bill, pointed out that it was frequently difficult, if not impossible, to find the address of a debtor after his departure from this country, and that a compliance with the requirements of the Code was therefore not always reasonably practicable. Of course, where the summons could not be served, the clause requiring service would not apply, but it was proverbially difficult to prove a negative. The Committee felt the force of these remarks, and struck out the exception in question, which by the bye, did not occur in the corresponding provision of the English law (4 Anne, Cap. 16, section 19) as to persons absent beyond the seas.

In section 19 we had struck out the exception which allowed oral evidence to be given of an acknowledgment wrongfully destroyed by the person upon whom it was binding. The case was one which could seldom occur, since the plaintiff had ordinarily the possession of the document. We had thought it simpler to make no exception to the rule in this clause, which excluded oral evidence of such documents.

In section 20 we had extended the effect of part payment to all debts, whether arising out of a contract in writing or not. "Why," asked Mr. Wilkinson, the Recorder of Rangoon, "should a part payment endorsed on a promissory note by the payor, or one admitted as such, in his own handwriting in the payee's bill-book, be entitled to [more] consideration than when a customer signs to a payment on account of principal in a shopkeeper's book or on the bill which he has made out

in respect of articles that were purchased over the counter?" We thought, too, it would suffice to provide that the fact of part payment should appear in the handwriting of the person making it. The ordinary case of a debtor making a part payment by letter would thus be provided for.

We had provided not only that several partners or executors, but also several joint-contractors or mortgagees should not be chargeable by reason only of an acknowledgment or payment made by one of them. This was in accord with 19 and 20 Vic., c. 57, s. 14, and 3 and 4 Wm. IV. c. 27, sec. 28.

We had struck out the clause relating to successive trespassers, which was based on the opinion apparently held by the late Lord Romilly in *Dixon* vs. *Gayfere.* The Committee were not sure that the proposed rule was right, and in any case it would have been of little or no practical utility.

In the second Schedule we had made a few changes as to the time from which the periods begin to run. Thus, in the case of suits to enforce a right of pre-emption, the present law provided that the period should begin when the purchaser took actual possession under the sale impeached. But in the North-Western Provinces High Court a doubt had been raised (I. L. R. 1 All. 315) as to the application of this provision to cases in which the subject of the sale was an equity of redemption, a reversionary interest or any other thing that did not admit of what the High Court termed "visible and tangible possession." The Committee, after much consideration, had determined on making the time run in such cases from the time when the instrument of sale was registered.

Incidentally, the change would have the effect of promoting the use of written instruments in such transactions and of encouraging the practice of registration.

In the case of suits for money lent under an agreement that it should be payable on demand, we had made the time run from the date of the transaction instead of from the demand the date prescribed by the present law, the framer of which in this respect had followed a judgment of the Bengal High Court (6 Beng. 160), which judgment rested on what the authority of Mr. Justice Holloway (*quis jure peritior?*) emboldened Mr. Stokes to call a mistake of Austin's. It seemed unreasonable that a creditor should be able to give himself an unlimited time to sue by merely abstaining from making a demand. Moreover,

as Mr. Justice Innes, one of the Judges of the Madras High Court, observed, in a minute to which the Committee were much indebted—

"It is a well known principle of English as well as Continental law, that the words 'payable on demand' are not a condition. The creditor, by the clause, does not seek to impose a conditional obligation, he merely gives notice to the debtor that he is to be ready to pay the debt at any time when called upon. If the obligation depended upon a personal act of the creditor (as Savigny observes), it would be extinguished by his death before demand, which is not the case. Consistently with this view it has always been held in England that a debt payable on demand was a debt from the date of the instrument, on which date therefore the cause of action arose (*Norton* v. *Ellam*, and other cases), and that time runs from that date and not from date of demand."

The Committee agreed with Mr. Innes in thinking it desirable that the law in India and that in England should be in accord on this point, as they were prior to the enactment of Act IX. of 1871.

No. 125 related to suits during the life of Hindu widows to have their alienations declared to be void except for their lives, and No. 141 dealt with suits for possession of land to which the plaintiff was entitled on the death of a Hindu widow. We had extended the scope of these Numbers so as to meet the case of Muhammadan widows. Mr. J. W. Smith informed us (and he was confirmed by the Panjab Government and by Sir Edward Bayley) that—"in the greater part of the Panjab, Muhammadan widows succeed to their husbands' lands when there are no sons or descendants in the male line, and they hold such lands for life or till they marry again exactly in the same way as Hindu widows succeed. Suits to set aside alienations made by Muhammadan widows, or to have them declared void, except for the life or till the remarriage of the widow, are quite as numerous in the Panjab as suits to set aside alienations made by Hindu widows."

This fact, coupled with the existence of the undivided family system among the Muhammadans of the Lower Provinces of Bengal, shewed how cautious we should be in assuming that the profession of Islam involved the adoption of the Muhammadan law of property.

We had thought it better to restore the limitation of sixty years in the case of suits for foreclosure and redemption and suits by the Secretary of State in Council. The reasons for this change were clearly stated by Mr. Naylor, the Remembrancer of Legal Affairs, Bombay :

"There are many unredeemed mortgages of very old standing in this Presidency, and from the commencement of our rule we have always taught the people to think that there is virtually no period of limitation for the recovery of mortgaged property. The sudden change from sixty to thirty years will very much affect the nature of mortgage transactions, and whilst it can do no good it may do much harm. Sixty years is also, in my opinion, not too long a period to allow for suits on behalf of the Crown. I doubt, in fact, whether it is expedient to prescribe any limitation at all for such suits in a country where the rights of the State are so apt to fall into abeyance and get lost sight of; but if some period is thought necessary it should not be less than sixty years."

As regards mortgages, Mr. Naylor's opinion was supported by the authority of Mr. Gore Ouseley, the Financial Commissioner, Panjab, and as regards suits on behalf of the Crown, by that of Colonel MacMahon, the Commissioner, Hissar Division.

We had extended from thirty to sixty days the period allowed for applications under sections 363 and 365 of the Code of Civil Procedure by persons claiming to be legal representatives of deceased plaintiffs and seeking to have their names entered on the record. Our reasons were two: first because last February, when the Bill was introduced, Maharaja Jotindra Mohan Tagore said that "in most cases thirty days was the time of mourning for Hindus, and unless the time was extended, it might operate harshly; a man could not be expected to come forward and put in his claim within the period of mourning:" secondly, because Mr. Broughton, the Administrator General of Bengal, had also stated that thirty days seemed too short a time to obtain representation—"at any rate," he said, "in my case, for it is the practice now to issue citations, in all but very exceptional cases, when I apply for letters of administration."

The other alterations which we had made were comparatively unimportant. They were all minutely stated in the final report; and Mr. Stokes trusted that the Council would now allow the Bill to become law

It was, no doubt, imperfect and incomplete. For instance, a Limitation Act should certainly comprise rules as to the time of commencing prosecutions for the various offences under the Penal Code, and we should have inserted the necessary provisions as to this matter, had we

not felt the need of consulting the Local Governments before making so important an addition to our law, and for this there was no time. But such as it was, Mr. Stokes could honestly say that no pains had been spared by Sir Arthur Hobbhouse, Sir Edward Bayley, Mr. Cockerell and himself to make the Bill accurate and useful.

It would doubtless require repairs in the course of six or seven years. "Time," said Lord Plunket, speaking of the law of prescription, "Time holds in one hand a scythe, in the other an hour-glass. The scythe mows down the evidence of our rights, the hour-glass measures the period which renders that evidence surperfluous." The great orator, had he been familiar with Indian legislation, would have rendered his metaphor complete by adding that the frame-work of his hour-glass would certainly decay, the glass be broken and the sand escape.

The Motion was put and agreed to.

The Hon'ble Mr. Stokes then moved that the Bill as amended be passed. He said that he wished to supply an omission in his remarks on the former motion and to notice the recommendation made by certain officers of Bombay and the Panjab, and by the Calcutta Trades Association, that the period allowed for suits for unsecured debts should be extended from three to six years. If the matter were open at present to alteration, he would be inclined to agree with those gentlemen, especially as the English law of limitation for actions of debt grounded on simple contract was six years after the cause of action had arisen, and the facilities for recovering debts were certainly less in India than in England. But we must remember first that the present period of three years had been established in India since 1859, and though he could not speak positively as to the reason why so short a time had been fixed, one might fairly conjecture that it was owing to the fact that written evidence of payment was much more liable to destruction in this country than it was in England. Secondly, before making so important a change in the law, it would be necessary to refer the point to all the Local Governments; and judging from an experience now extending to nearly twelve years, the answers to that reference would certainly not be received and considered by the Home Department for six months, that was to say, nearly four months after the new Code of Civil Procedure (with which this Bill should come into force simultaneously) would have begun to operate. No doubt, the commencement of the Code might be postponed But this would require further legislation; and the post-

ponement might perhaps re-open questions which were now closed and would certainly for some months deprive the debtor-class of the benefits which the Code was intended to confer on them, and which, we had been assured, were urgently required. Mr. Stokes hoped, therefore, that the Council would allow the Bill to pass to-day, and it would give some comfort to the gentlemen in question, and to the Hon'ble Mr. Hope, who, he believed, sympathised with them, if he mentioned briefly the alterations in favour of the creditor which would be made by this Bill if it were allowed to pass as it stood. First of all, the Bill provided for the case of a creditor affected by double or successive disabilities. Secondly, where a debtor was absent from British India, the Bill excluded the time of his absence, whether the creditor could or could not serve him with a summons to appear and answer. Thirdly in the case of part payment of principal, the Bill merely required that the fact of the payment should appear in the handwriting of the debtor. As the law now stood, the debt must have arisen from a contract in writing, and the payment must appear not only in the handwriting of the debtor, but on the instrument, or in his own books, or in the books of the creditor. After the Bill had come into force, a part-payment of the amount of a tradesman's bill or a banya's account endorsed on the bill or account by the debtor would give a new period of limitation. In these three respects the position of the creditor would be distinctly improved by the Bill.

The Hon'ble Mr. Hope asked whether he had rightly understood the Hon'ble Member to say that he thought the Bill would probably require amendment in six or seven years.

The Hon'ble Mr. Stokes replied in the affirmative.

The Hon'ble Mr. Hope remarked that in that case he could only express his regret that so important a subject as that of the extension of the period of limitation for suits for money debts should be relegated to limbo, for so long a time, and expressed his opinion that it would be preferable to defer, if necessary, the passing of this Act, as well as the operation of the Civil Procedure Code, till next January, in order to affiord sufficient time to have the question sifted even in a more thorough manner, if possible, than it had already been sifted by the Deccan Riots Commission and others, whose reports on the subject had already been some five or six months in the possession of the Select Committee.

The Motion was put and agreed to.

CALCUTTA HIGH COURT.

The 11th and 19th July, 1877.

PRESENT:

The Hon'ble Sir R. Garth, Kt., Chief Justice, and the Hon'ble Mr. Justice Macpherson.

ARCHIBALD KELLIE (Defendant) *Appellant,*

vs.

D. D. FRASER (Plaintiff) *Respondent.*

Jurisdiction—s. 327 *of Act VIII. of* 1859—*Arbitrators—Award.*

The mere fact that the object of a partnership is the carrying on of a (tea) concern does not make a suit for adjustment of accounts and dissolution—a suit for land. Where in referring matters to arbitration one partner had the object of removing the other from the management of the partnership property and of enforcing a dissolution of the partnership upon suc terms as the arbitrators should think proper, it was *held* that as he did not seek to obtain possession of, or to acquire a title to the tea garden, because that was already the property of the partnership, and as the effect of the award was only to dissolve the partnership and to dispose of the partnership property upon what the arbitrators considered the most just and reasonable terms, that therefore a suit instituted by one of the partners to carry out these objects is not a "suit for land" properly so-called, and that as the High Court might have given the plaintiff leave to bring such a suit in the High Court (although the land belonging to the concern lay outside the ordinary original jurisdiction of the High Court,) t. High Court had also jurisdiction, under section 327 of Act VIII. of 1859, to confirm the award.

Messrs. Jackson and T. Apcar, instructed by Messrs. Orr and Harriss, for the defendant, appellant.

Messrs. J. D. Bell and G. H. Evans, instructed by Messrs. Chauntrell and Co., for the plaintiff, respondent.

This was an application under Section 327 of the Code of Civil Procedure to make an award of arbitrators a rule of Court, and it was opposed on the ground that the Court had no jurisdiction, as the effect of the award would be the sale of land in Darjeeling, and the case was therefore one involving the title to land within Section 12 of the Letters Patent.

In the first Court, the learned Judge (Kennedy, J.) made the award a rule of Court.

GARTH, C. J.—This is an appeal against an order and decree made by Mr. Justice Kennedy, confirming an award made by two arbitrators under Section 327 of the Civil Procedure Code.

The facts were these. By a deed dated the 12th of April 1876 Mr. Kellie and Mr. Fraser became partners in the business of a tea garden at Darjeeling, of which they were the owners in certain shares; and the deed contained a clause under which any dispute or difference which should arise between them about the partnership business, or the rights, duties or liabilities of either of them, was to be referred to arbitration as therein provided.

In the month of August 1876 differences did arise between the partners, which were referred to arbitration, and an award was made; but as some irregularity had occurred during the proceedings, the Judge of this Court refused to confirm the award.

Mr. Fraser's solicitors then, by letter dated the 29th of December 1876, required Mr. Kellie to refer to arbitration the following questions:—

1. Whether you are bound forthwith to execute a mortgage to Mr. Fraser of your rights and interest in the estate in terms of the deed of partnership.

2. Whether you are bound to furnish accounts and estimates to Mr. McIntosh as agent.

3. Whether you are liable to Mr. Fraser for any, and what sum in respect of money misapplied, for damage caused by your conduct, or costs incurred thereby.

4. Whether the partnership ought not to be dissolved, and if so, upon what terms.

Mr. Leslie thereupon, as Mr. Kellie's solicitor, named Mr. Shepherd as his arbitrator, and required Mr. Fraser to name an arbitrator on his part; and Mr. Fraser then nominated Mr. Kellner.

Mr. Shepherd, however, after much delay, refused to act as arbitrator, and Mr. Kellner then appointed Mr. Reily to act in his stead.

Mr. Kellner and Mr. Reily subsequently made an award, dated the 7th May last, to the following effect:—

They found a sum of Rupees 19,776-5-11 to be due from Mr. Kellie to Mr. Fraser. They directed Mr. Kellie's share in the partnership property to stand charged with that sum, and they ordered that Mr. Kellie should forthwith execute a mortgage of his said share to Mr. Fraser to secure the money.

They further found that Mr. Kellie had been, and still was, persisting in a course of conduct prejudicial to the property, and they

therefore ordered a dissolution of the partnership upon certain terms, and

Lastly. They ordered that the tea garden should be sold by Mackenzie, Lyall and Co. at Calcutta, under certain conditions.

This award was duly confirmed by Mr. Justice Kennedy by an order dated the 8th of June last, which is the subject of this appeal.

The appellant, Mr. Kellie, contends—

1st. That this Court had no jurisdiction to confirm the award, and

2ndly. That the authority of the arbitrators was revoked by both parties before the award was made.

In support of the first objection, it has been argued that the only Court competent to confirm the award under Section 327 was the Court in which a suit must have been brought to settle the differences between the parties, if those differences had not been referred to arbitration, and that as the subject matter in dispute was a tea garden at Darjeeling, and as both the litigants were resident there, the suit would have been a suit for lands, and must have been brought in the Darjeeling district, and therefore that the Darjeeling Court was the only one capable of confirming the award.

The answer to this contention on the part of Mr. Fraser was that the suit under such circumstances would not have been a "suit for land" within the meaning of Section 12 of the Letters Patent, and that as a part of the cause of action arose in Calcutta, inasmuch as the deed of partnership was executed there, the High Court might, although Mr. Kellie was resident at Darjeeling, have given leave to Mr. Fraser to bring this suit in the High Court; and that any Court in which such a suit might have been brought would have been "the Court having jurisdiction" over the matter in dispute within the meaning of Section 327.

Upon this point, we have been referred to several authorities, some of which have been discussed by the learned Judge in the Court below; and particularly to the late case of the Delhi Bank *vs.* Wordie (1 Indian Law Reports, Calcutta, p. 249), where it was held that a suit brought for the purpose of compelling the sale of a trust property was a "suit for land."

It will be observed however that in all or almost all the cases upon which the appellant relies, the suit was brought for the purpose of

acquiring the possession of, or of establishing a title to, or an interest in the property which was the subject of dispute, more particularly in the case of the Delhi Bank *vs.* Wordie, where the object of the petitioner was to establish the title of certain trustees to a share in a portion of the trust property claimed by a person of the name of Lightfoot, and the establishment of this title was an essential element of the entire claim.

Now, in this case, it clearly appears, both from the description of the matters in difference and from the award itself, that Mr. Fraser's real object was to remove Mr. Kellie from the management of the partnership property, and to enforce a dissolution of the partnership upon such terms as the arbitrators should think proper.

He did not seek to obtain possession of, or to acquire a title to the tea garden, because that was already the property of the partnership, and the effect of the award was only to dissolve the partnership, and to dispose of the partnership property upon what they considered the most just and reasonable terms.

I consider therefore that any suit instituted by Mr. Fraser to carry out these objects would not have been a "suit for land," properly so called; and that as the High Court might have given Mr. Fraser leave to bring such a suit in the High Court, that Court had also jurisdiction, under Section 327, to confirm the award.

As regards the other point, *viz.*, the alleged revocation of the submission to the arbitrators, I am of opinion that the evidence relied on by the appellant is not sufficient to justify us in finding that a revocation did in fact take place.

It is true that pending the proceedings, a telegram was sent from Darjeeling by both parties to Calcutta in these words, " Stay further proceedings; arrange matters here;" but having referred to the circumstances under which that telegram was sent, and to the subsequent correspondence and conduct of the parties, we do not consider that this telegram operated, or was even intended to operate, as an absolute revocation of the submission.

I think therefore that the appellant has failed upon both grounds, and that the appeal should be dismissed with costs on scale 2.

MACPHERSON, J.—I also think that this appeal must be dismissed.

A suit the object of which has to deal with the matters, the subject of this arbitration, might certainly, in my opinion have, with the leave

of the Court first obtained, been instituted on the original side of this Court. The partnership deed having been executed in Calcutta, it seems to me that, according to the current of decision here, it is impossible to say that no part of the cause of action arose within the local limits of the ordinary original civil jurisdiction.

Of course if the suits were a suit for land, within the meaning of Section 12 of the Letters Patent of 1865, there would be no jurisdiction, the whole land lying in Darjeeling. But it is not a suit for land within that section. There is no dispute as to the title to the land. The questions at issue relate to the partnership between Kellie and Fraser, the mode in which its business has been and ought to be conducted, and the adjustment of accounts and winding up of the partnership. The mere fact that the object of the partnership was the carrying on of a tea concern does not make a suit for adjustment of accounts and dissolution—a suit for land. If it did, then this result would follow that, although all the members of a partnership were permanently resident in Calcutta, and the chief business of the partnership was at the time of suing, and always had been conducted in Calcutta, a suit for an account and dissolution would not lie here, if one asset of the partnership happened to be an indigo factory or a tea garden in the Mofussil. Yet, in the case suggested, there can be no manner of doubt a suit could be entertained by this Court on its original side; and such suits have, in fact, been repeatedly entertained.

The peculiarity in the present case is that the defendant Kellie is not personally subject to the jurisdiction at all, save by reason of parts of the cause of action (to wit, the execution of the partnership deed) having arisen in Calcutta. Had he been personally subject, by reason of residing in Calcutta, probably the question which has been raised would never have been suggested.

Some discussion has taken place as to the effect of the judgment of the Court in the case of the Delhi Bank *vs.* Wordie. But I cannot gather from the report that the decision of the Appellate Court in any way modified or altered the earlier decisions. For the only point actually decided by the Appellate Court is that as the owner of a two annas' share of the property denied that he had ever conveyed his share to the defendants, to whom it was alleged to have been conveyed as trustees, the question of title as to these two annas was directly in issue, and therefore the suit was a suit for land and could not be entertained.

On the whole, I have no doubt that a suit might, with the leave of the Court first obtained, have been instituted here. And if a suit would have lain there, it appears to me that the Court had jurisdiction under Section 327 to order this award to be filed. I agree with Mr. Justice Kennedy in declining to attach to the words of that section "the Court having jurisdiction in the matter to which the award relates," the limited and a special meaning contended for, and in construing them as meaning *any* Court having jurisdiction to entertain a suit for the matter to which the award relates.

I further agree in the opinion that there was no revocation of the authorities to the arbitrators.

CALCUTTA HIGH COURT.

The 20th July, 1877.

FULL BENCH.

Before the Hon'ble Sir R. Garth, *Kt., Chief Justice,* and the Hon'bles L. S. Jackson, A. G. Macpherson, W. Markby, and W. Ainslie, *Judges.*

RAJ KUMAR SINGH and others (Defendants) *Appellants,*

vs.

SAHEBZADA RAI (Plaintiff) *Respondent.*

Public Road—Obstruction—Criminal Court—Civil Court.

When the Civil Court finds that an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, it can direct the defendant, who has placed the obstruction there, to remove it, notwithstanding that the Criminal Code contains provisions for the removal of obstructions in public thoroughfares by summary proceedings before a Magistrate.

This was a special appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 29th January 1876, reversing a decree of the Second Munsiff of Arrah, dated the 11th April 1874; and the material facts of the case are fully stated in the order of the learned Judge, referring the matter for the decision of a Full Bench, which was as follows:—

In this case the Lower Appellate Court has ordered the defendants to remove an obstruction which they had placed upon a public road near to the plaintiff's house. It is, in my opinion, sufficiently found that the plaintiff has suffered damage by the obstruction; and this not merely as one of the public, but as having his house in the vicinity of the

obstruction, so that it causes him a particular inconvenience of a substantial character. But there is a decision in the XXI. W. R., 145, that no order for the removal of an obstruction from a public road can be made by the Civil Court, even in such a case as this. On the other hand, there is a decision in the same volume, at p. 408, that a decree directing the removal of an obstruction is not erroneous in law.

I have been formally requested by the pleaders to refer this question to be Full Bench, and I do not think that in this state of the authorities I can refuse to do so.

The question referred is whether, when the Civil Court finds that an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, it can direct the defendant, who has placed the obstruction there, to remove it.

If the answer to this question is in the affirmative, in my opinion the special appeal should be dismissed; if in the negative, the appeal should be allowed, and the suit dismissed, with costs in all the Courts.

W. MARKBY.

The following judgment of the Full Bench was delivered by

GARTH, C. J.:—We are of opinion that, as the obstruction in this case has caused special injury to the plaintiff, the Civil Court was perfectly justified in directing it to be removed.

The Criminal Code no doubt contains provisions for the removal of obstructions in public thoroughfares by summary proceedings before a Magistrate; but there is nothing in those provisions which shows that the legislature intended to deprive a private individual of the redress which the law affords him under such circumstances, by means of a civil suit.

The special appeal will therefore be dismissed, with costs.

DIFFERENT KINDS OF MORTGAGES.*

[*In continuation of page* 203.]

I have already alluded to the practice which obtains in this country for the borrower, in the case of a mortgage by conditional sale, to convey the estate absolutely to the lender; the latter agreeing by a contemporaneous agreement, which is sometimes verbal, that he will reconvey the estate to the borrower on repayment of the loan. The question whether such parol agreement could be received in evidence to control the terms of a document which was on its face a deed of absolute sale, was raised in the Calcutta High Court in the case of *Kassinath Chatterjee* v. *Chundy Churn Banerjee* (5 W. R., p. 68), and was referred to a Full Bench, when a majority of the Judges returned an answer in the negative.

It is perhaps necessary to observe that the law laid down by the Court in *Kassinath Chatterjee* against *Chundy Churn Banerjee* does not in any way trench upon any rule of Hindu or Mahomedan law, neither of which, as I have already said, refuses to give effect to parol agreements.

" Admitting that the law allows sale of land or other contracts relating to land to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the writing, and to show that they intended something different from that which the writing expresses and was intended to express." " If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning that he intends to sell absolutely, he cannot, by mere verbal evidence, show, that at the time of the agreement, both parties intended that their contract should not be such as their written words express, but that which they expressed by their words to be an absolute sale should be a mortgage." (Per Peacock, C. J., in *Kassinath Chatterjee* against *Chundy Churn Banerjee*, 5 W. R.. 68.)

The exclusion of parol evidence for the purpose of qualifying the terms of a written instrument rests upon the presumption that when parties choose to reduce the terms of a contract to writing, they intend to insert the whole of the terms. Any other rule would open the widest door to fraud and perjury.

* *Vide* Tagore Law Lectures, 1875-76. Lecture III. by R. B. Ghose, Tagore Law Lecturer.

A distinction, however, is taken by the Court between parol evidence of an agreement and evidence of the "acts" of the parties, the Chief Justice being of opinion that parol evidence is admissible to explain the acts of the parties, as for instance, that the document purporting to be a conveyance was not accompanied or followed by possession.

It is perhaps not quite easy to discover the ground upon which the distinction is made,—a distinction which, as pointed out by a learned Judge, is hardly reconcileable with the principle upon which the exclusion of parol evidence is founded. In the case of *Madhub Chunder Roy* against *Gungadhur Shamuntho*, Mr. Justice Markby is reported to have said :—

"It seems to me to be very difficult to understand the distinction drawn between evidence of a parol agreement contradicting the terms of a written contract being inadmissible, and evidence of the parties contradicting the terms of such a contract being admissible. In all these cases, one starts with the proposition that there was a written instrument which unequivocally and unmistakeably declares the intention of the parties, and I should have thought that it was quite as objectionable, if not more so, to contradict the plain terms of the contract by what are called acts, by the Full Bench, which can only lead to an inference, than to contradict them by an express and unequivocal and unmistakeable parol arrangement between the parties. I should have thought that the principle was this, that when we have once got a clear expression in writing of that which professes to be the intention of the parties, that must conclusively be taken to be the relation which was intended to be created between them, and that to get at their intention, no other evidence, whether of contemporaneous acts or agreements ought to be admitted." (11 W. R., p. 451.)

Since the above observations were made, the Legislature has passed the Indian Evidence Act, section 92 of which says,—" When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms."

The language of the Act is not, perhaps, wholly free from ambiguity,

but I venture to think that, as the rule is laid down broadly and without any qualification or reservation, parol evidence of the acts or conduct of the parties is no longer admissible for the purpose of varying the terms of a written instrument.

I have said that conventional mortgages may be created either by writing or by parol. They may also be either express or implied. There is one important class of mortgages,—I say class, because in English law they form a class by themselves,—in which the law implies a mortgage from the conduct of the parties. Thus, if money is borrowed on a deposit of title-deeds, the law implies an intention to charge the property covered by the title-deeds with the repayment of the money. This, I need hardly point out, is very different from a true legal mortgage, which is not based upon any express or implied consent of the parties. In English law, a mortgage of the kind is called an equitable mortgage, because following a well-known maxim, equity regards the transaction in the same light as a formal mortgage; and this sort of mortgage being recognised in equity is called an "equitable mortgage" as opposed to a legal mortgage. The expression is also applied to similar transactions between the natives of this country, although, strictly speaking, it can be properly applied only in a country in which law and equity are administered as two distinct systems.

Equitable mortgages, although very common in the Presidency towns, do not seem to be common in the mofussil. We, indeed, find an instance of it in an early case in the Sudder Dewany Adawlut, but the parties to the transaction seem to have been residents of Calcutta, and the difference of opinion between the learned Judges by whom the appeal was heard, shows that the case was one of the first impression, and that the transaction was by no means common at the time. The report of the case to which I refer is not very full. It would, however, appear that one Ramlochun Paul being heavily indebted to the plaintiff and being pressed for payment, made over to him the title-deeds of certain property belonging to himself. It does not, however, appear that the debtor, when he made over the title-deeds, expressly stated his intention to offer them as a security for the debt. The property was afterwards sold under an execution by the Sheriff, and the purchaser bought with notice of the plaintiff's claim. The plaintiff sought to enforce his lien on the property, contending that the purchaser under the execution had purchased the property subject to his lien. The Zillah Judge having

given judgment in favor of the plaintiff upon the ground that the deposit by the borrower of the title-deeds was equivalent to a mortgage, the decree was affirmed on appeal to the Sudder Dewany Adawlut, although, as I have already said, one of the Judges was inclined to think that the mere delivery of the title deeds was not sufficient to clothe the creditor with the rights of a mortgagee. (6, Select Reports, p. 165.) Since the decision in the above case, the Mofussil Courts in Bengal have invariably given effect to a deposit of title-deeds as a valid simple mortgage, although, as I have told you, this is not an usual mode of giving security outside the Presidency towns.

In the case which I have cited from the Select Reports, the Court inferred an intention to create a mortgage from the mere fact of the delivery of the title-deeds to the creditor. The deposit of title-deeds, however, is sometimes accompanied by an agreement, either verbal or written, in which the intention to create a charge is expressly stated. When that is done, the transaction does not substantially differ from an express conventional mortgage; and there is no reason why, as between parties who can pass land without writing and without delivery of possession, such a transaction should not be given effect to. In a case in the Madras Presidency, in which the local Sudder Dewany Adawlut had refused to recognise the validity of such a transaction, Lord Kingsdown, in delivering the judgment of the Lords of the Judicial Committee of the Privy Council in appeal, is reported to have said :—" The decision of the Sudder Dewany Adawlut, so far as it respects the enforcement of the lien against the third and last defendants, appears to have proceeded upon the ground that the principles of the English law applicable to a similar state of circumstances ought not to govern the decision of that suit in those Courts. This was correct if the authoritative obligation of that law on the Company's Courts were insisted on. There is, properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally according to justice, equity, and good conscience. The question then is, whether the decision appealed against violates that direction or not. The Court of Appeal, reversing the prior decisions, has decided that the contract was not operative as a hypothecation, or pledge, even between the parties to it. Yet the evidence shows that the plaintiff looked not simply to the personal credit of the person with whom he contracted, but bargained for a security on land.

If any positive law had forbidden effect to be given to the actual agreement of the parties to create that lien, the Court, of course, must have obeyed that law. If the contract of lien were imperfect for want of some necessary condition, effect must have been, in like manner, denied to it as a perfected lien. But nothing of this sort is suggested in the pleadings, or proved. It is not shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race and creed. By the Mahomedan law, such a contract as the one under consideration, for a security in respect of a contingent loss, would be one not of pawn, but of trust. (Hedaya, Vol. IV., p. 208, tit. 'Pawns.') It is not declared that any writing or actual delivery is essential to the creation of such trust by that law; but as the contracting parties are not both Mahomedans, that law would not have governed the question of the validy and force of their contract, even in the Supreme Court. The plaintiff is a Christian; the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shewn that any local law, any lex loci rei sitæ, exists, forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the general law of the place where the contract was made, that is, the English law, the deposit of title-deeds as a security would create a lien on lands, though, as between parties who can convey by deed only, or conveyance in writing, such lien would necessarily be equitable. In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves." (9 Moo. Ind. App., 303.)

(To be continued.)

CALCUTTA HIGH COURT.

The 19th December, 1876.

PRESENT:

Mr. Justice Markby and Mr. Justice Ainslie.

BRAMMOYE DASSEE* on behalf of Brojo Nath Singh and another (Plaintiffs) *Appellants,*

vs.

KRISTO MOHUN MOOKERJEE, (Defendant) *Respondent.*

Res Judicata—Act VIII. of 1859, *ss.* 2 *&* 170*—Hindu Widow—Reversioner.*

A, a Hindu widow, brought a suit to recover possession of her husband's share of certain joint property. After partially examining some of her witnesses, she cited the defendant as a witness, and on his failure to attend, her suit was dismissed. After the death of the widow, her daughter sued the same defendant on behalf of her two minor sons, as being entitled in reversion to their grandfather's share, to recover the share which was the subject of the former suit: the defendant was summoned as a witness, but failed to attend. *Held,* that the suit was not barred under s. 2, Act VIII. of 1859, as being a *res judicata,* until it was shown that the former decree had been obtained after a fair trial of the right, so as to bind not only the widow, but the reversioners. The defendant having failed to attend and give evidence on this point, the Court was justified in giving the plaintiff a decree under s. 170, Act VIII. of 1859.

MARKBY, J.—In this case we think the judgment of the first Court was a right judgment, and ought not to have been disturbed by the lower Appellate Court.

It appears that there were three brothers entitled to a certain property. A decree had been obtained against two of the brothers, Shib Prosad and Bhola Nath. Their rights and interests in the property were sold, and the defendant got into possession. The widow of one of the brothers then brought a suit for declaration of her title to one-third share of the property. An issue was raised whether that share was the right and interest of the plaintiff as alleged by her, or of Shib Prosad and Bhola Nath as alleged by the defendant. There were other parties to that suit, but that does not seem to be material. After the death of the widow, the heir of her husband brought the present suit for posses-

* *Vide* I. L. R., 2, Calcutta Series, p. 222.

sion. The decree in the former suit was set up as a bar to the present suit; and an issue was raised whether or no that decree was a bar to the present suit.

The Munsif, who tried the suit, seemed to have had some doubt whether, in point of law, the former decree was a bar to this suit. He also held that there was no proper trial upon the issues raised in the former suit. He then went on to say that the plaintiff, in the present suit, had relied mainly upon the evidence of the defendant; and, inasmuch as the defendant having been summoned did not choose to appear in Court, he gave the plaintiff a decree under s. 170 of the Civil Procedure Code.

The District Judge entirely concurs with the Munsif in thinking that this is a proper case to be dealt with under that section; but thinks that section could not be applied to the present case, because in this case the plaintiff cannot show a legal right. What he means by that apparently is, that the legal right which the plaintiff sets up in this case is wholly barred by the decision in the former suit. But the District Judge seems to have overlooked this,—that there was in the present case not an absolute bar such as there would have been, if this were the case of a decree against the person through whom the plaintiff claims. The rule that a decree against the widow binds the reversioner is subject to this qualification, that there has been a fair trial of the right in the former suit. That is laid down in what is commonly called the *Shivagunga case* (1) and in the decision of this Court to the same effect, with which I entirely concur, in the case of *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry* (2). It was there pointed out that the Privy Council, in a more recent case (3), have said that, while they adhere to the rule that the widow represents the estate of the reversioner for some purposes, it is her duty not only to represent the estate, but to protect it also.

Now, in this case, it is obvious that there were some grounds for looking closely to see what really took place in the former suit, because we find that the former suit was disposed of in a manner which, on the face of it, seems to be not satisfactory. The plaintiff in that suit, after having brought her suit, and after having partially examined one witness, declined to examine any of her other witnesses. She had also

(1) 9 Moore's I. A. 539. (2) 15 B. L. R., 142; *vide* p. 159.
(3) *Nogender Chunder Ghose* v. *Sreemutty Kaminee Dassee*, 11 Moore's I. A., 241.

cited the defendant, the same person who was cited to appear in this case. It does not, however, appear whether she made any real attempt to get the defendant into Court, or whether the summons was served upon him. Anyhow he never came into Court, therefore there was good ground for inquiring whether there was a fair trial of the question between the parties in the former suit, and whether the plaintiff performed her duty in protecting, not only her own interest, but the interests of the person who was to take after her death.

Upon that question the evidence of the defendant is most important. Therefore the Court has a perfect right to say that the decree in the former is not a bar to this suit, until there had been some inquiry as to how it was obtained. And the defendant refusing to come in to give his evidence upon that point, the Court would be justified in dealing with the case under s. 170 of Act VIII. of 1859. We may assume for the purposes of this judgment that the decree in the former suit would have been a bar to the present suit, if it had been properly obtained; but that would not in any way prevent the Court from inquiring into the question whether it was so or not. Having regard to the circumstances which I have mentioned, the Munsif was right in dealing with the case under s. 170. We think, therefore, that the judgment of the first Court was right and ought to be restored, and that of the lower Appellate Court reversed. The plaintiff will get the costs in this Court and in the lower Appellate Court.

THE DOCTRINE OF CAKES OR PINDAS.*

Baboo Krishna Kamal Bhattacharya, reputed for his eminent scholastic attainments, formerly Professor of Sanskrit in the Calcutta Presidency College and now a vakeel of the Calcutta High Court, has recently published a pamphlet entitled " On some unsettled questions of Succession under the Bengal School of Hindu Law." On a perusal of this little book, the reader will find it to be a clear exposition of the doctrine of funeral cakes or *pindas*, upon which the whole fabric of the Hindu law of succession is based, and will be convinced that the author has shown his great learning and researches respecting Hindu Law in elucidating the said doctrine, in examining the rules laid down by the late

* A pamphlet entitled "On some unsettled questions of Succession under the Bengal School of Hindu Law, by Krishna Kamal Bhattacharya, B. L.: Calcutta, Bonnerjea & Co., 1877."

Justice Dwarka Nath Mitter in the case of Guru Govindo Shaha in the 13th W. R., F. B., p. 49, and in criticising their construction by Sir Richard Couch in the case of Govind Proshad Talookdar in the 23rd W. R., p. 117. The author has admirably dealt with his subject. The conclusions arrived at by him seem to be sound and well-founded. There is no doubt whatever that this little work will be an important addition to our legal literature. The author has fixed one Rupee as its price, but in our estimation it is worth considerably greater. We feel sure that the work will be found by the Bench and the Bar to be of great practical utility. In recommending it to the public and in justification of our remarks we make the following extracts from it:—

In the preface, the author says "The following pages are an attempt to contribute to the removal of the present unsettled condition of the Law of Succession under the Bengal School. In substance, they embody the result of a comparison of certain passages of the Dáyabhága with the celebrated judgment of the late lamented Justice Dwarka Nath Mitter, in the leading case of Guru Govindo Shaha, reported in the 13th Weekly Reporter, Full Bench Rulings, page 49. The conclusion at which I have arrived by this comparison is that the rules of succession propounded by Dwarka Nath Mitter in that judgment have been admirably generalized from the details of the Dáyabhága, and that except in two individual instances, these rules are reconcilable with all that is contained in the Dáyabhága. Recently, however, a decision has been made by Sir Richard Couch, reported in the 23rd Weekly Reporter, p. 117, in the case of Gobindo Proshad Talookdar, wherein that learned Judge has construed the rules of Dwarka Nath Mitter, in a manner that limits their operation and makes them irreconcilable with the Dáyabhága. I have endeavoured to show how those rules should be construed in a different way, so that their departure from the indications of the Dáyabhága may be as small as possible. As by far the greater portion of these pages deals with the doctrine of funeral cakes, I subjoin the fundamental propositions of that doctrine, together with the rules laid down by Dwarka Nath Mitter, in order that the purport of much of what I have written may be readily comprehended by persons who are not accustomed to speculate on these topics.

Fundamental Propositions of the Doctrine of Cakes.

1. A male person offers cakes to his father, grandfather and great-

grandfather in the paternal line, and also to his mother's father, grandfather and great-grandfather in the maternal line.'

2. A is said to be sapinda to B if he gives pinda or cakes to B, if he receives cakes from B, or if both A and B give cakes to a common ancestor C.

Rules laid down by Dwarka Nath Mitter.

1. Among Sapindas, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor, are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only, for the first kind of cakes are of superior religious efficacy in comparison with the second.

2. Those who offer a larger number of cakes of a particular description, are preferred to those who offer a less number of cakes of the same description.

3. Where the number of such cakes is equal, those that are offered to nearer ancestors, are preferred to those offered to more distant ones."

Then after fully and clearly explaining the doctrine of cakes and supporting his arguments by quotations from various authorities, the author in conclusion says " The only way in which we can preserve the general applicability of the rules of Justice Dwarka Nath Mitter, so as to occasion the least possible interference with their integrity, is to add a proviso after the second rule, and so to construe the three rules that the cases of the father's, grandfather's and great-grandfather's daughter's sons, may not be placed beyond the sphere of their application.

The second rule is :—

' Those who offer a larger number of cakes of a particular description, are invariably preferred to those who offer a less number of cakes of the same description.'

This rule fails in the case of the brother's son's son, who, although the giver of only a single cake, (namely to his own great-grandfather, who is the same as the proprietor's father), in which the deceased proprietor participates, is yet expressly preferred by the Dáyabhága (Ch. XI., S. vi., Para. 6) to the father's whole brother of the deceased, although the father's whole brother gives two cakes in which the de-

ceased participates. It also fails in the instance where the father's father excludes father's brother, although the latter offers two cakes shared by the deceased, while the former only one such.

The proviso, therefore, that we should annex to the second rule would be :—

Provided that, if, of two candidates for heirship, one offers a cake to the father of the deceased, he is in every case to be preferred to one who does not do so.

Provided also, that in every case, the collateral heirs shall succeed after the common ancestor from whom they descend.

It will be remembered that the reason assigned by Jímútaváhana for preferring the brother's son's son to the father's whole brother is that the former gives pinda to the father of the deceased, who is the principal person to be thought of; instead therefore of making of it, an individually exceptional case, we turn it into a general proposition, founded upon the reason which we find assigned in our work of authority.

As to the second part of the proviso above, this has become necessary, in order to explain the succession of the father's father in exclusion of the father's brother; for in such a case, father's father, being the first ancestor common to the father's brother and the deceased, is, by the application of the latter part of the above proviso, succeeds preferentially.

The other precaution that we should observe in the application of the second rule is, that by the expression, 'cakes of a particular description,' we must understand, 'cakes of either of the two great divisions,' cakes offered to the paternal ancestors of the deceased proprietor being included in one of these two divisions, and cakes offered to the maternal ancestors of the deceased being included in the other. In this way, we would not exclude the cakes offered by the sapindas of the daughter's-son kind, (if we may be allowed to make use of such an expression), on the paternal side of the deceased proprietor, but would take into account every cake that is given to any of the paternal sapinda ancestors of the deceased be it even offered on the mother's side of the giver.

What then, it will be asked, becomes of the principle, that cakes presented to the maternal ancestors are secondary, the principle namely which is found in Colebrooke's Digest, and which was the ratio decidendi in the case reported in 23 W. R. p. 117. Our answer is, that the said

principle is of great service in explaining a certain peculiarity in the law of succession. It will be found, upon examination of Paras. 8, 9 and 10, S. vi., Ch. XI., of the Dáyabhága, that the plain intention of the author is, that all the qualified descendants of the father must be exhausted, before the inheritance can rise to the grandfather; similarly neither the great-grandfather nor his descendants can come in, so long as any qualified descendant of the grandfather exist. And this successive ascent of the inheritance from one generation to the next above, may be well explained by the second and the third rules of Justice Mitter. But at the same time a gap remains in the explanation of the law of succession; for instance, it remains unexplained why the father's daughter's son should be postponed to the father's descendants, as far as the great-grandson, in the male line. Now, the aforesaid principle found in the Digest of Colebrooke, that cakes presented to the maternal ancestor are secondary, would well explain this peculiarity. But this principle must be limited to the case of the descendants of each sapinda ancestor taken apart in each generation; in other words, we must say that the father's descendants of the daughter's-son kind are postponed to the father's descendants, who are not of that kind. So, the grandfather's descendants of the daughter's-son kind are postponed to his descendants who are not of that kind. So on to the great-grandfather. But never should a father's descendant of the daughter's-son kind be postponed to a grandfather's descendant of an opposite kind. In the case reported in the 23rd Weekly Reporter, p. 117, Sir Richard Couch has held contrariwise, and has thereby turned the cases of father's, grandfather's and great-grandfather's daughter's sons into exceptional ones, although it is almost certain that the special reason which he thought applied to those individuals does not exist at all; that there is no reason to suppose that the deceased proprietor is in the slightest degree more benefited, in the spiritual sense, by his grandfather's daughter's son, or by his great-grandfather's daughter's son, than he would be by his brother's daughter's son. On the contrary, it is certain that the brother's daughter's son offers two cakes in which the deceased participates, while the great-grandfather's daughter's son offers only one such. In fact it cannot be imagined into what a state of uncertainty our law of succession will again be cast, if we insist upon the correctness of the proposition that a grandfather's great-grandson in the male line excludes a brother's daughter's son. Such a proposition would no doubt be conformable to

the rules of succession under the Mitakshara law, as that law in every case prefers the *gotraja* or agnatic relatives to the *bandhu* or cognate ones. But nothing can be farther from the spirit of the Bengal law, than to hold an agnatic descendant of a more distant ancestor superior to a cognate one of a nearer ancestor. We are the more concerned at the fact of such having been authoritatively held, because our succession law had all but attained a state of certainty under Justice Dwarka Nath Mitter's rules. Now that those rules, admittedly founded upon the indications to be found in Jímútaváhana's work, have been declared to be inapplicable to three individual instances in the Dáyabhága, which are supposed to be governed by a special reason, that does not really exist, the result will be that every case of disputed succession will be a bone of contention between propounders of special reasons, which are in plenty in the books of Hindu Law.

We have above pointed out how by a slight modification the rules of Justice Mitter may be made conformable to all the individual cases given by Jímútaváhana; we have also tried to show how the principle of Jagannatha may be availed of, in order to explain the inferior claims of the heirs of the daughter's son among the descendants of each individual ancestor, taken apart. Our belief is, that thus modified and supplemented, Justice Dwarka Nath Mitter's rules will be found to be a satisfactory guide in the determination of every possible question of disputed succession.

We do not mean to say that these rules can be reconciled with every thing contained in the three other Bengal treatises of Raghunandana, Srikrishna, and Jagannatha. But that is not of much consequence, provided that the rules remain conformable to the Dáyabhága. The three other authors are but the disciples of Jímútaváhana; and none of them seems to have ever tasked themselves to find out general rules, so as to comprehend all the variety of cases. The Dáyabhága itself has omitted to lay down general propositions, by the simple application of which we might determine the superior or inferior rights of any two of the remoter sapindas. The first attempt in that regard was made by Justice Mitter in the leading case of Guru Gobindo Shaha (13 W. R. F. B. 49.) The attempt has been all but entirely successful. Our best endeavour at present therefore should be to keep them intact, as much as we can, without coming into collision with the direct indications to be found in the Dáyabhága our paramount work of authority.

TABLE OF SAPINDAS SHOWING THE AMOUNT OF SPIRITUAL BENEFIT CONFERRED BY EACH.

N. B.—Pindas or cakes may be characterised as of three kinds. When A gives pinda directly to B, as a son to his father, grandson to his grandfather, &c., there the pinda may be said to be a direct one; when A only shares with another ancestor pindas given by a third to that ancestor, there the pindas may be said to be shared by A; for example, A shares pindas given by his brother to his father.

Pindas are called secondary, when they are given to the maternal ancestors of the giver.

IMMEDIATE SAPINDAS.

1. Son gives 1 pinda direct, and 2 shared.
2. Grandson 1 " " 1 "
3. Great-grandson 1 " " none "
4. Daughter's son 1 direct, but secondary, & 2 shared but secondary.
5. Son's daughter's son, 1 direct secondary, 1 shared secondary.
6. Grandson's daughter's son 1 ditto none ditto.

SAPINDAS ON THE FATHER'S SIDE.

1.	Father	none direct,	2 shared.
2.	Brother	ditto	3 ditto.
3.	Brother's son	ditto	2 ditto.
4.	Brother's son's son ...	ditto	1 ditto.
5.	Father's daughter's son ...	ditto	3 ditto secondary.
6.	Brother's daughter's son ...	ditto	2 ditto ditto.
7.	Brother's son's daughter's son	ditto	1 ditto ditto.
8.	Grandfather	ditto	1 ditto.
9.	Father's brother	ditto	2 ditto.
10.	Father's brother's son ...	ditto	2 ditto.
11.	Father's brother's son's son ...	ditto	1 ditto.
12.	Grandfather's daughter's son	ditto	2 ditto secondary.
13.	Father's brother's daughter's son	ditto	2 ditto ditto.
14.	Father's brother's son's daughter's son	ditto	1 ditto ditto.
15.	Great-grandfather ...	ditto	none shared.
16.	Grandfather's brother ...	ditto	1 shared.
17.	Grandfather's brother's son ...	ditto	1 ditto.

18. Grandfather's brother's son's son none direct, 1 shared.
19. Great-grandfather's daughter's son .. ... ditto 1 ditto secondary.
20. Grandfather's brother's daughter's son ... ... ditto 1 ditto ditto.
21. Grandfather's brother's son's daughter's son... ... ditto 1 ditto ditto.

As regards sapindas on the mother's side, none of the pindas given by them are shared by the last owner; in their case, the consideration is, how many pindas given by them are such as the deceased would have given, on his own part. Therefore, against the name of each sapinda, we place a figure to indicate the number of persons who are the common recipients from that particular sapinda and the deceased.

SAPINDAS ON THE MOTHER'S SIDE.

1. Mother's father ... ... 2 pindas that deceased would give.
2. Mother's brother 3
3. Mother's brother's son 2
4. Mother's brother's son's son... ... 1
5. Mother's sister's son ... ... 3 secondary.
6. Maternal uncle's daughter' son ... 2 ditto.
7. Maternal uncle's son's daughter's son ... 1 secondary.
8. Mother's grandfather ... ... 1 pinda given by the deceased.
9. Mother's father's brother 2
10. Mother's father's brother's son .. 2 given by the deceased.
11. Mother's father's brother's son's son ... 1 ditto.
12. Mother's grandfather's daughter's son ... 2 secondary.
13. Mother's father's brother's daughter's son 2 ditto.
14. Mother's father's brother's son's daughter's son ... . 1 ditto.
15. Mother's great-grandfather .. ... None; but receives a pinda and is therefore a sapinda.
16. Mother's grandfather's brother gives ... 1 pinda given by the deceased.
17. Mother's grandfather's brother's son ... 1
18. Mother's grandfather's brother's son's son 1

19. Mother's great-grandfather's daughter's son 1 secondary.
20. Mother's grandfather's brother's daughter's son ... ... 1 ditto.
21. Mother's grandfather's son's daughter's son 1 ditto.

The definition of a sapinda may be stated in three separate Propositions.

I. A is sapinda to B, if A gives pinda to B.

II. A is sapinda to B, if A receives pinda from B.

III. A is sapinda to B, if both give pinda to a common ancestor C.

All the immediate sapindas become so, in accordance with the Proposition I.

Nos. 1, 8 and 15 out of the sapindas on both the father's side, and the mother's side, become so, in accordance with the Proposition II.

All the rest of the sapindas on both the father's and the mother's side, acquire that relationship, by virtue of the Proposition III.

TABLE OF SUCCESSION AS IT MAY BE DRAWN UP FROM THE EXPRESS WORDS OF THE DAYABHAGA, WITH REFERENCE TO THE PROPERTY LEFT BY A HOUSE-HOLDER.

I.	Sapindas	Dáyabhága	Ch. XI.	S. vi.	Para.	19
II.	Sakulyas	,,	,,	,,	,,	21
III.	Samanodakas	,,	,,	,,	,,	23
IV.	Spiritual Preceptor	,,	,,	,,	,,	24
V.	Disciple	,,	,,	,,	,,	24
VI.	Fellow-Student	,,	,,	,,	,,	...
VII.	Persons of the same gotra dwelling in the same village ...	,,	,,	,,	,,	25 & 26
VIII.	Persons of the same pravara dwelling in the same village ...	,,	,,	,,	,,	25 & 27
IX.	Brahmins of the same village	,,	,,	,,	,,	26 & 27
X.	The King, except with regard to the wealth of a Brahmin ...	,,	,,	,,	,,	26 & 34

Succession of the Class I. or of Sapindas.

No.	Heir	Authority				
1.	Son, and grandson whose father is dead, and great-grandson whose father and grandfather are dead. Dáyabhága Ch. XI. S. i., Para. 34 ; S. vi. Para. 29.					
2.	Grandson ...	... Dáyabhága Ch.		S. i.	Para.	43
3.	Great-grandson ...	„		„	„	43
4.	Widow	„		„	„	43
5.	Maiden daughter ...	„		S. ii.	„	4
6.	Married daughter, who has, or is likely to have a son	„		„	„	8
7.	Daughter's son	„		„	„	25
8.	Father	„		S. iii.	„	1
9.	Mother	„		S. iv.	„	1
10.	Re-united whole brother ...	„		S. v.	„	36
11.	Un-re-united whole brother and re-united half brother together	Dáyabhága	Ch..	S. vi.	Para.	36
12.	Re-united half brother ...	„	„	„	„	36
13.	Un-re-united half-brother ..	„	„	„	„	36
14.	Re-united whole brother's son and S. v. Para. 39.	„	„	„	„	2
15.	Un-re-united whole brother's son and re-united half-brother's son together ..	„	„	S. v.	„	39
16.	Re-united half-brother's son	„	„	„	„	39
17.	Un-re-united half-brother's son	„	„	S. vi.	„	2
18.	Brother's son's son ...	„	„	„	„	6
19.	Father's daughter's son ...	„	„	„	„	7

As far as father's daughter's son, the Dáyabhága has expressly specified, who is to succeed first, and who next after him.

After the father's daughter's son. the succession is indicated in general terms. Thus :—

A. The descendants of the paternal grandfather, including the daughter's son, in the proximity by way of pinda. Dáyabhága Ch. XI. S. vi. para. 9.

B. The descendants of the great-grandfather, including the daughter's son, in the same order. Dáyabhága Ch. XI. S. vi. para. 9.

C. Maternal uncle &c., who are the givers of pinda given by the deceased, paras. 12, 14, & 20.

Succession of the Class II. or the Sakulyas.

1. The three descendants of the deceased, from the grandson of the grandson of the deceased. Dáyabhága Ch. XI. S. vi. Paras. 21 & 22.
2. The descendants of the three ancestors from the great-great-grandfather upwards, who offer pindas to the eaters of lepa given by the deceased. Dáyabhága Ch. XI. S. i. para. 38 and S. vi. para. 22.

This is all the Dáyabhága states as to the succession of Sakulyas among themselves.

As to the succession of the Class III. or the Samanodakas, the Dáyabhága lays down no other rule except that they succeed after the Sakulyas.

TABLE OF SUCCESSION IN ACCORDANCE WITH THE RULES LAID DOWN BY MR. JUSTICE DWARKA NAUTH MITTER, IN THE CASE OF GURU GOBINDO SHAHA, 13 W. R. F. B. 49.

1. Son.
2. Grandson.
3. Great-grandson.
4. Widow.
5. Unmarried daughter.
6. Married daughter, having or likely to have a son.
7. Daughter's son.
8. Father.
9. Mother.
10. Re-united whole brother.
11. Un re-united whole brother and re-united half-brother together.
12. Un-re-united half-brother.
13. Brother's son. (1)

(1.) The internal arrangement as among the different kinds of brother's sons is as follows :—

(a) Re-united whole brother's son.

(b) Un-re-united half-brother's son and re-united whole brother's son together.

(c) Un-re-united half-brother's son.

14. Brother's son's son. (2)
15. Father's daughter's son, or the son of a sister, whole or half.
16. Son's daughter's son.
17. Brother's daughter's son.
18. Son's son's daughter's son.
19. Brother's son's daughter's son, whether the brother be whole or half.
20. Grandfather.
21. Grandmother.
22. Father's whole brother. (3)
23. Father's half-brother.
24. Father's whole brother's son.
25. Father's half-brother's son.
26. Father's whole brother's son's son.
27. Father's half-brother's son's son.
28. Grandfather's daughter's son, whether it be the whole or half sister of the father.
29. Father's brother's daughter's son, whether the whole or half.
30. Father's brother's son's daughter's son, whether the brother be whole or half.
31. Great-grandfather.
32. Great-grandmother.
33. Grandfather's whole brother.
34. Grandfather's half-brother.
35. Grandfather's whole brother's son.
36. Grandfather's half-brother's son.
37. Grandfather's whole brother's son's son.
38. Grandfather's half-brother's son's son.
39. Grandfather's sister's son, whether the sister be whole or half.
40. Grandfather's brother's daughter's son, whether the brother be whole or half.

(2.) The internal arrangement as among different kinds of brother's son's sons is as follows:—

(*a*) Whole brother's son's son.

(*b*) Half-brother's son's son.

(3.) As among father's brothers also, the rule determining the preferential right on the ground of re-union is to be applied, as in the case of one's own brethren.

41. Grandfather's brother's son's daughter's son, whether the brother be whole or half.
42. Mother's father, or maternal grandfather.
43. Mother's brother, whole or half, or maternal uncle.
44. Maternal uncle's son.
45. Maternal uncle's son's son.
46. Mother's sister's son, whether the sister be whole or half.
47. Mother's brother's daughter's son, whether the brother be whole or half.
48. Mother's brother's son's daughter's son, whether the brother be whole or half.
49. Mother's father's father.
50. Mother's father's brother, whole or half.
51. Mother's father's brother's son, whole or half.
52. Mother's father's brother's son's son, whole or half.
53. Mother's father's sister's son, whether the sister be whole or half.
54. Mother's father's brother's daughter's son.
55. Mother's father's brother's son's daughter's son.
56. Mother's great-grandfather.
57. Mother's grandfather's brother, whole or half.
58. Mother's grandfather's brother's son, whole or half.
59. Mother's grandfather's brother's son's son, whole or half.
60. Mother's grandfather's sister's son, whole or half.
61. Mother's grandfather's brother's daughter's son.
62. Mother's grandfather's brother's son's daughter's son.

Then come Sakulyas, as follows—

63. Great-grandson's son.
64. Great-grandson's son's son.
65. Great-grandson's great-grandson.
66. Great-grandfather's father.
67. Descendants of No. 66 in the male line as far as the sixth degree; the degrees are to be counted excluding himself. Then such of the descendants of No. 66 in the female line, as offer pinda to him.
68. Then great-grandfather's grandfather and his descendants of the same kind as those of No. 66, both in the male and in the female line.

69. Great-grandfather's great-grandfather and his descendants of the same kind, as those of No. 66, both in the male and in the female line.

    Then the Samanodakas, viz. ;—

70. The seventh ancestor from the deceased, counting his father as one.

71. Then the descendants of No. 70 in the male line and such descendants of the daughter's-son kind, as offer pinda to No. 70.

   So on as far as relationship with the deceased can be traced.

N. B.—The Sakulya relationship extends as far as the sixth degree of ascent or descent.

   See Dáyabhága, Ch. XI. S. vi. para. 21.

   The Samanodaka relationship extends so far as common descent can be traced. See Vrihatmanu quoted in the Mitakshara, Ch. II. S. v. para. 6.

   Lastly come the specified strangers, enumerated at the end of Appendix Nos. 2, 3, &c."

SHORT NOTES.

CALCUTTA HIGH COURT.

Civil Procedure Code (Act VIII. of 1859*), s.* 26, *cl.* 4 *and* 5, *and ss.* 135, 139, *and* 141—*Amendment of Plaint—Allegations of Facts—Limitation—Act IX. of* 1871, *s.* 19—*Personal Equity.*

In 1817 the ancestor of the plaintiffs had obtained from the zemindar a maurasi istemrari lease of a certain portion of his property. In 1837 the entire zemindari was put up to sale for arrears of Government revenue, and was purchased by Government as the highest bidder, who thereupon granted a lease for a term of twenty years to *W.* This revenue sale was never set aside; but in 1842 the Government restored the estate to the Rajah zemindar with all the prior incumbrances, but subject to his confirming the lease to *W.* In 1844 the father of the plaintiffs brought a suit to recover possession of their tenure, but the suit was dismissed by the Principal Sudder Ameen, on the ground that the right to sue had not accrued, and could only arise on the expiration of the lease to *W.* This judgment was reversed by the Sudder Dewany

Adawlut, but was restored and affirmed on appeal by the Judicial Committee. In the meantime, and before the expiry of the lease to *W*, owing to certain fraudulent transactions on the part of *A*, who had got into possession of the estate as the purchaser of the interests of certain mortgagees of the Rajah, the property was again put up to sale for arrears of Government revenue, and was purchased by *M*, a party to the transactions above-mentioned. The Rajah, however, succeeded in getting this sale reversed in 1866, and obtained possession of his estate in 1871. In a suit, instituted on the 23rd October 1873, against the Rajah and certain other parties, to whom he had granted a patni lease, the plaintiffs alleged that the sale of 1837 was set aside by Government as illegal, and that consequently their tenure had revived; that the effect of the Principal Sudder Ameen's decision, confirmed by the Privy Council, was to postpone their right to obtain possession of their tenure, until after the expiration of the lease to *W*; that when that lease expired, the property was in the possession of *M*, of the fraudulent character of whose title they had no knowledge; and that their right to sue in the present case consequently arose only in 1871. The defence was that the plaint disclosed no cause of action; that the cause of action, if any, was barred by the law of limitation; and that the tenure was destroyed by the proceedings connected with the sale in 1837, which was never set aside. The Judge held that the plaint disclosed a cause of action which arose in 1837, and that the suit was consequently barred. He accordingly dismissed the suit without taking any evidence.

On appeal to the High Court, it was admitted on the part of the plaintiffs that the sale of 1837 was never set aside; but it was contended that the restoration of the zemindari to the zemindar, "with all the former incumbrances," gave rise to an equity of a personal character against the Rajah, and those taking under him with notice of the plaintiffs' title, to restore the plaintiffs' tenure, which equity fastened upon him on his obtaining actual possession of the estate; and that therefore the cause of action accrued only in 1871. On the part of the defendants it was objected that the plaintiffs had no right to make a new case in appeal, and inasmuch as the equity which was now sought to be fastened on the zemindar was never raised in the pleadings it could not now be set up. *Held*, that, under ss. 139 and 141 of the Civil Procedure Code, the plaintiffs might be allowed to amend their case in any stage before a final decision: and inasmuch as, if the plaintiffs' case as

so amended were proved, the suit would not be barred, it was necessary for the determination of the question of limitation that the case should be remanded to the lower Court for trial.

Semble.—S. 19 of Act IX. of 1871 is applicable only to those cases where the fraud is committed by the party against whom a right is sought to be enforced.

From cl. 4 and 5 of s. 26 of Act VIII. of 1859, it would appear that where a whole estate bearing a name is sued for, the boundaries need not be given.

Per MITTER, J. *Quere.*—Whether, if the plaintiffs' case were established, their claim would not be saved from the operation of the Law of Limitation by s. 29, Act I. of 1845.

Vide I. L. R., 2, Calcutta Series, 1, (Markby and Mitter, JJ.) The 10th June, 1876—Ramdoyal Khan *vs.* Ajoodhia Ram Khan.

Criminal Proceedings—Irregularities—Effect of Waiver by Prisoner—Disqualifying Interest of Judge—Judge giving Evidence.

The jailor of a district jail being accused by one of the jail clerks of falsifying his accounts and defrauding the Government, the matter was enquired into by the District Magistrate, and the jailor was, by the Magistrate's order, placed on trial before a Bench of Magistrates, consisting of the District Magistrate himself, *L*, the Officiating Superintendent of the Jail, and three other Honorary Magistrates. The prisoner and his pleaders were alleged to have stated before the commencement of the trial on being questioned that they had no objection to the composition of the Bench, but after the charges had been framed, the prisoner's Counsel objected to the Bench as formed. The District Magistrate directed the Government pleader to prosecute, and both the District Magistrate and *L* gave evidence for the prosecution. After the case for the prosecution was closed, two formal charges were drawn up, namely, that the prisoner had debited Government with the price of more oil-seed than he actually purchased, and that he had received payment for certain oil at a higher rate than he credited to Government. The moneys, the receipt of which were the subject of the first charge, were obtained by the prisoner on the strength of certain vouchers which he had induced *L* to sign as correct, and *L* had sanctioned the sale at the rates credited to Government. Upon the prisoner's giving the names of the witnesses he intended to call in his defence, *L* was deputed

by his brother Magistrates to examine some of them who were connected with the jail, in order "to guard against deviation," and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The prisoner was convicted. On a motion to quash the conviction,—

Held, that *L* had a distinct and substantial interest which disqualified him from acting as Judge.

Held further, that although a Magistrate is not disqualified from dealing with a case judicially merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so, and where he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution.

Held further, that the recording the statements of the prisoner's witnesses was irregular.

Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.

Vide I. L. R., 2, Calc. Series, 23, (Macpherson and Morris, JJ.) The 15th June 1876. The Queen *vs.* Bholanath Sen.

Limitation Act (IX. of 1871), *cls.* 122 *&* 145—*Will—Residuary Estate of Moveable and Immoveable Property—Express Trustee—Account—Multifariousness—Jurisdiction—Certificate under Act XX. of* 1841 —*Act XXVII. of* 1860, *s.* 2—*Suit by Hindu Widow without Certificate —Claims to Immoveable Property against Executors and Trustees.*

Held, that cl. 122 of Act IX. of 1871 applies to a suit for a share of the residue of a testator's moveable property disposed of by his will.

Prior v. *Horniblow* (1) followed.

Held also, that if a testator appoints persons to be his executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take that estate, though there be no express devise to them.

Vide I. L. R., 2, Calc. Series, 45 (Pontifex, J.) The 13th June and 7th July, 1876. Treepoorasoondery Dossee *vs.* Debendronath Tagore.

(1) 2 Y. & C. Ex. 200.

Studies Necessary to Students of Law.

"Bacon and Adam Smith, Shakespear and Milton, they say, will not make a man a Lawyer, or a Surgeon, or an Engineer, or a Merchant.

"Most true. But they will make a man what is surely essential that he should be, whatever calling he may follow. They will make him a moral and intellectual being.

"It is their office to preserve him from that narrowness of mind, which is apt to be caused by exclusive devotion to mere professional studies; and to arm him against those temptations to swerve from the path of rectitude which will beset him more or less in all walks of life." So said Cameron. While Blackstone in reciting the advantages which a student of law might derive from previous academical education, observed: "If, therefore, the student in our laws hath formed both his sentiments and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathemetical demonstrations: if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine, experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it, (though all may be easily done under as able instructors as ever graced any seats of learning) a student thus qualified may enter upon the study of the law with incredible advantage and reputation. And if, at the conclusion, or during the acquisition of these accomplishments, he will afford himself a year or two's farther leisure, to lay the foundation of his future labours in a solid scientifical method, without thirsting too early to attend that practice which it is impossible he should rightly comprehend, he will afterwards proceed with the greatest ease, and will unfold the most intricate points with an intuitive rapidity and clearness."

CALCUTTA HIGH COURT.

The 29th June 1877.

PRESENT:

The Hon'ble E. G. Birch and R. C. Mitter, J.J.

BHOOBUN MOHUN BANERJEE, (a Defendant) *Appellant,*

versus

MODDUN MOHUN SINGH (Plaintiff) *Respondent.*

Hindu Law—Inheritance—Daughter—Stridhan.

According to the Dayabhaga, a daughter's rights over property inherited by her, are not absolute. Her powers of disposition are governed by the ordinary rules applicable to property inherited by females. Stridhan which has once devolved ceases to be ranked as such and is after devolution governed by the ordinary rules and subject to the restrictions impose upon female takers of property by inheritance.

BIRCH, J.—The plaintiff sues to recover possession of certain lands held by defendants under a mocurraree grant obtained from Shamasoondree in 1272. His contention is that Shamasoondree had no power to grant a mocurraree lease, and that on her death in Bysakh 1277 the pottah ceased to have any force. As the Defendants have continued in possession of the property notwithstanding, the plaintiff seeks to recover possession.

The defendant pleads that Shamasoondree, whom he describes as a childless widowed daughter, inherited the land from her mother Kishoree Dassee in 1241, and being unable to manage the properties, leased them to him at fixed rent in 1272, and asserts his right to retain possession.

Both Courts have given the plaintiff a decree, holding that the disputed property was inherited by Shamasoondree from her mother, but that Shamasoondree had only a limited interest in it and could not grant a mocurraree lease.

In special appeal, it is contended that the Courts are wrong in holding that Shamasoondree had no power to grant a lease in perpetuity, of a property which she had inherited from her mother.

The property was originally the Stridhan of Shamasoondree's mother. When it devolved by inheritance upon Shamasoondree, it ceased to be stridhan, became subject to the ordinary rules which control the disposition of property acquired by inheritance by females.

A widow's power over an estate inherited from her husband and a mother's power over an estate inherited from her son have been long settled,—and I should have thought that it would be now admitted that a female taker by inheritance has a limited estate—enjoyable by her during her life but which she must not dispose of or encumber to the prejudice of the next takers except for recognized necessity.

But the pleader for the appellant seeks to establish in this case that a daughter succeeding by inheritance to her mother's stridhan property acquires over the property so coming into possession, an absolute estate.

If we could hold that the property which was the mother's stridhan came to the daughter as stridhan, the daughter's power of disposal thereof would be unquestioned. But stridhan which has once devolved ceases to be ranked as such, and is after devolution governed by the ordinary rules and subject to the restrictions imposed upon female takers of property by inheritance [Sel. Rep. vol. i. p. 3. Dayabhaga Chap. XI. Section 1,—57-58.]

The pleader for the appellant relies upon Sections 30 and 31, Chap. XI. Section 2, Dayabhaga, Section 30 treats of the daughter's succession to her father's property on the demise of his widow. Section 3 refers back to Section 56 Chap. XI. Section, and in that verse the Commentator remarks that the word wife "patni" is of general import, and that the rule contained in Section 56 must be considered applicable to the succession of any female by inheritance. The rule being that she is not entitled to make a gift, mortgage or sale of property coming to her by heritage. Section 57 propounds absolute right of a female over her stridhan. Section 58 declares that property devolving by heritage is *not* stridhan, and thus leaves it subject to the restriction imposed by Section 56 on property inherited by females. Property so inherited may be alienated, but it must be for some recognized necessity and with the consent of the next takers.

The contention that the daughter has an absolute instead of a qualified estate in property *inherited* by her from her mother appears to me to be unsupported by any text of the Dayabhaga. I find no authority for drawing a distinction between property inherited by a daughter from her mother and property inherited from her father.

In page 214 Macnaghten vol. 2, a Bengal case, the question was raised whether a daughter was competent to make a gift of property to a stranger without the consent of her father's brother's sons who were the next takers. The reply was that if the property came to the daughter by succession she had no power to give it without her father's consent. In page 224 of the same volume a childless widowed daughter who had inherited from her father was declared incapable of making a gift of such property without the consent of the next heirs.

In the case of Hurry Dass Dutt *versus* Upoorna Dassee, it was urged a daughter's power over property inherited from her father was more restricted than that of a widow over her husband's estate, but the point was not decided. The authority cited by the Respondent's Pleader from 4 Sel. Rep. 330 Musst Gyan Koonwar was a Behar case governed by the Mitacshara. It is referred to in a case reported in XIV. B. L R. 235. All the authorities upon the point interpreting the Mitacshara are reviewed in that case and it is held that under the Mitacshara, the state which a daughter takes in property inherited from her father is only a qualified estate. Her position is declared to be in respect of alienation no higher than that of a widow.

In the case of Musst. Gyan Koonwar a passsage from the Viramitrodaya is cited "the power of a daughter over ancestral property is not such as that she should alienate it at pleasure."

In Nobin Chunder Chuckerbutty *versus* Iswar Chunder Chuckerbutty IX. W. R. 505, Sir Barnes Peacock classes female heirs, such as mother's daughter and the like, in the same category as widows and says that the same restrictions as to alienation are applicable to them.

In page 21 Mr. Macnaghten says the daughter's interest in her inheritance is not absolute. This remark appears to be of general application, and not to refer to any particular part of the country.

The text of the Mitacshara is to the effect that property taken by inheritance from her father by a daughter is stridhan and that she has absolute control over it. But a series of decisions of this Court culminating in that reported in XIV. B. L. R. 238 have settled the law on this side of India where the Mitacshara prevails to be that a daughter takes only a qualified interest in such property. The text of the Dayabhaga expressly lays down that what is in-

herited by a woman is not stridhan and the cases I have mentioned relating to Bengal where the Dayabhaga is in force are against the contention that a daughter's rights over property inherited, are higher than those of a widow. Whether the property comes to the daughter from her father or her mother makes no difference. In neither case is it stridhan, and therefore its disposition is governed by the ordinary rules applicable to property inherited by females.

Shamasoondree had no power to make this mocurraree grant in favour of the defendants, and the plaintiff as heir is entitled to obtain possession of the property.

The special appeal is dismissed with costs.

Mr. Justice Mitter.—In this case the Courts below have found that the properties in dispute were *stridhan* of Kishoree who received them in gift from her husband. Although the finding has been questioned in Special Appeal as regards one of the properties, but I do not think that we can interfere with it. There is evidence to support it and no error of law has been established to justify our interference.

The Lower Courts have also found that the plaintiff is the heir of the former owner, whether that former owner be taken to be Kishoree or her husband. In Special Appeal no exception has been taken to this, and we are therefore relieved from considering this question.

The only point that requires our consideration is whether Shamasoondry having inherited to this *stridhan* property of her mother had power to alienate it.

It has been now settled beyond the possibility of a doubt that a female whether widow, daughter's mother, grandmother or great-grandmother succeeding to properties left by a *man* by right of inheritance has not the power of alienation except under certain especial circumstances. The question we have to decide is whether the same rule applies to the inheritance of women in regard to *stridhan* property.

That *stridhan* inherited by a woman does not become her *stridhan* is clear. See Dayakrama Sangraha Chap. 11 Section 11 para. 12, and Section III. para. 6, Macnaghten's Hindu Law p. 38, 1 Sel. Rep. p, 3., 2 Bengal Report p. 144, 3 Madras High Court Rep. But it has been remarked by Mr. Macnaghten in the passage referred to above, that upon the death of the woman who inherits

to a *stridhan* property, it passes to her heirs meaning evidently to persons, who would inherit to her properties other than *stridhan*. With the greatest deference to that learned author it seems to me that this remark is founded upon some misconception of the provisions of the Hindu Law upon the subject. According to Hindu Law a woman can have only two kinds of properties, *viz.*, (1) *stridhan* and (2) inherited properties. As to the first class, there is an exhaustive enumeration of the heirs, and as regards properties inherited from a man it goes after her death to the heirs of the last owner, and it seems to me that the same rule holds good also as regards *stridhan* property inherited by a woman, *i. e.*, upon her death it goes to the heirs of the last owner. Dayakrama Sangraha Chap. 11, Sec. 3 para. 6, already referred to clearly establishes this proposition.

It seems to me that the same rule is laid down in Dayabhaga Chap. XI. Section 1 para. 3. The Chapter in question, it is true, mainly deals with rules of succession to properties left by a deceased male owner but the paragraph referred to above, appears to me to lay down a rule applicable generally to succession by women, whether to the properties of a man or to *stridhan* of a woman. If it were not so there would be no provision in Dayabhaga relating to succession to a property inherited by a woman from a female ancestress who held it as *stridhan*. I do not think that this is probable. Having regard to this circumstance and having regard to the language of the paragraph in question which is very general, it seems to me that the rule there laid down is also applicable to *stridhan* property inherited by a woman.

Further it seems to me also clear that the rule referred to in the aforesaid paragraph is that laid down in para. 56 of Section 1 Chap. XI. It has been said that the whole of the latter rule is not intended to be extended to a woman's succession by inheritance generally but that part of it which provides that after the death of a female heiress the heirs of the last owner take the inheritance.

If we adopt this limited construction we must then come to the conclusion that according to Dayabhaga there is no restriction to the powers of alienation of women succeeding by inheritance to the properties of a deceased male owner except in the case of a widow. It is too late now to contend for such a construction of the law as this. Repeated decisions have settled the question beyond the possibility of a doubt. It seems to me therefore clear that by

the paragraph in question what is rendered applicable "generally to the case of a woman's succession by inheritance" is the whole of the rule laid down in para. 56 of Section 1 of Chap. XI. of Dayabhaga.

The result therefore is that Shamasoondree in this case succeeding to her mother's *stridhan* had no power of alienating the properties inherited by her, except for special purposes sanctioned by the Hindu Law. The Special Appeal therefore must be dismissed with costs.

DIFFERENT KINDS OF MORTGAGES.

[*In continuation of p.* 227.]

EQUITABLE MORTGAGE.*

I have said that equitable mortgages form a distinct group in the English law of securities. It was, however, very slowly that they found a place in that system, and their ultimate recognition is solely due to the action of the Court of Chancery. The Statute of Frauds provides that all agreements relating to any interest in land must be reduced to writing, and equitable mortgages were supposed to trench upon the statue. They were, however, admitted by the Court of Chancery by a somewhat refined distinction between executed and executory contracts. Equitable mortgages were first introduced by Lord Thurlow, but Lord Eldon and Sir William Grant were both averse to any extention of the doctrine. It was at first attempted to confine the rule only to those cases in which the delivery was made with the object of executing an *immediate* pledge; but the doctrine has since been overruled, and equitable mortgages have maintained their ground in English law, notwithstanding the jealousy with which their introduction was at first regarded. We have here an instance, by no means exceptional, in which the law has been compelled to yield to the exigencies of commerce. As observed by Lord Abinger,—"In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title-deeds, and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute." (*Keys* v. *Williams*, 3 Y. & C., 61.)

* *Vide* Tagore Law Lectures 1875-76, Lecture III by R.B. Ghose, p. 75 to 87.

The objections, however, which apply to equitable mortgages in England, do not apply to them in India. The doctrine, therefore, has been firmly established in this country. A somewhat bold attempt was made to question it in a recent case in the Bombay High Court, but, as might be expected, it was unsuccessful. (7 Bom. High Court Rep., 45, Original Side.)

I have already said that the expression "equitable mortgage" is not properly applicable to a transaction between natives of this country, and if I use it, it is only out of deference to long continued usage. The objection is not a mere verbal one. The case of *Luchmiputty* and *Seth Varden Sam* shows the danger of extending technical English expressions to transactions which have only a partial resemblance to the things denoted by such expressions. In the Madras case, the defendants insisted in their defence upon the doctrine of the English Court of Chancery, that they were protected from the claims of the plaintiff as purchasers for value without notice. Now if you examine the real nature of an equitable mortgage in the English law, and that of a mortgage by delivery of title-deeds in India, you will find a very remarkable distinction. In the English law, an equitable mortgage is only an agreement to mortgage owing to the incapacity of persons subject to the English law to convey otherwise than by deed. In this country, however, there being no such restriction, a delivery of title-deeds of itself operates as a conveyance. Now, as I have already explained to you, a contract does not create any real right, although English Courts of Equity, proceeding upon a very sensible ground, treat the contract as a conveyance as against purchasers with notice of the agreement. In an English Court of Equity, therefore, a purchase for value without notice would be a perfectly good defence to a suit by an equitable mortgagee, but in this country it would not furnish any answer, for the so-called equitable mortgage not being in any sense a *contract* for a mortgage, the Indian equitable mortgagee has a right superior to that of any person claiming under a title subsequently derived from the mortgagor. It seems to me that the defence in the Madras case, to which I have referred, was suggested by the use of the unhappy expression "equitable mortgage" to denote the nature of the right of the plaintiff in that case. I think I have said enough to put you on your guard against the misconceptions, which an inaccurate use of

technical terms, borrowed from an extremely artificial foreign system, seldom fails to occasion. (See, however, *Bunsheedhur* v. *Heera Lall,* 1 All., 166.)

I have already stated that the deposit of title-deeds is sometimes accompanied by a memorandum in writing, setting forth the nature of the transaction. Even in this case, however, the memorandum is not the contract between the parties; but the contract is implied by the Court from the deposit of the title-deeds and the advance of the money on such deposit. In the case of a mortgage in writing, if the instrument is unregistered, the mortgagee cannot, generally speaking, enforce his security against the land, because the contract is evidenced by the instrument itself, and that being inadmissible in evidence, no other evidence is allowed to be given. In the case, however, of a mortgage by deposit of title-deeds, although there may be a memorandum, the memorandum is not looked upon as the instrument creating the mortgage, but, as observed by the Court in *Kedarnath Dutt and another* v. *Sham Lall Khettry* (20 W. R., p. 150) "the mortgage is created by the agreement which is evidenced by the loan and the deposit of the title-deeds. The mortgagee may, therefore, rely upon the parol agreement, which is implied by the deposit of the title-deeds. It must, however, be remembered that the mortgage would not be a mortgage in writing, but a parol mortgage, and therefore subject to all the incidents of a parol mortgage. The distinction is an important one, and requires to be illustrated by one or two recent cases in which the question has been raised. In the case of *Kedarnauth Dutt and another* v. *Sham Lall Khettry,* to which I have already alluded, the facts were shortly these. The plaintiff, who asked the Court to declare his rights as an equitable mortgagee on certain premises, had advanced to Woomachurn Banerjee a certain sum of money on the deposit of the title-deeds of certain property, belonging to the borrower. Woomachurn also executed a promissory note, whereby he promised to pay to " Sham Lall Khettry or order the sum of Rs. 1,200, with interest at the rate of 24 per cent. per annum, for value received in cash." There was an endorsement on the promissory note in these words:—" For the repayment of the loan of Rs. 1,200, and the interest due thereon of the within note-of-hand, I hereby deposit with Baboo Sham Lall Khettry, as a collateral security by way of equitable mortgage, title-deeds of my-

property situate at No. 11 in Fuckeer Chand Mitter's Street at Mirzapore in Calcutta." "Woomachurn Banerjee." There was some question as to whether the transaction was completed when the promissory note was given, but the Appeal Court thought that the question whether there was a complete equitable mortgage before the promissory note was given, or whether that was the completion of the transaction, was not material. It seems that after the deposit of the title-deeds the property was sold under an execution against Woomachurn and purchased by the defendants Kedernath Dutt and Madhub Chunder Bose. These defendants resisted the plaintiff's suit on the ground that the mortgage was created by an express agreement which was reduced to writing, and, as the endorsement was not registered, the plaintiff could not enforce any claim against the land which, as I have already said, had intermediately passed to them under an execution against Woomachurn Banerjee. The objection, however, was overruled. Sir Richard Couch in giving the judgment of the Court observed:—"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within section 17 of the Registration Act. But it was not a writing of that character. As I have said, the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title-deeds. The promissory note, whether given either at the same time or some hours afterwards in pursuance of the understanding between the parties, was evidence of the terms upon which the loan was made, *viz.*, that the interest should be at the rate of 24 per cent.

"But as regards the contract between the parties, if there had been no memorandum at all on the promissory note, there would have been a complete equitable mortgage. When we consider what the memorandum is, we find it is not the contract for the mortgage, not the agreement to give a mortgage for the Rs. 1,200, but nothing

more than a statement by Woomachurn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given. It is not by the memorandum that the Court takes the agreement for the mortgage to be proved, but by the deposit of the deeds. This is no more than a piece of evidence showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced.

"On the ground, therefore, that this was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred, I think it does not come within the description of documents in the 17th section of the Registration Act." (20 W. R., 150.)

There is another case to be found in the books (7 Bombay, 50) which is somewhat stronger. In that case the plaintiff had agreed to lend a certain sum of money to Devji Keshavji on a deposit of the title-deeds of certain property belonging to the debtor. The title-deeds having been deposited, the plaintiff continued to advance certain sums of money from time to time till the whole sum advanced amounted to that which the plaintiff had originally agreed to advance. On the 13th of June 1865, after the Registration Act of 1864 had come into force, and when the last advance was made, a Guzrati document was executed by the debtor in which, after stating the amount which had been advanced from time to time by the plaintiff, the debtor proceeded to say,—"According to these particulars I have received or borrowed from you at interest Rs. 25,000 in cash and currency notes. On account of the same (there are mortgaged) at your place my piece of land at Naigâni, namely, a garden with a building (or) a bungalow, which (land) is registered under No. 36 in the Collector's books, and the building or dwelling-house built on the said piece of land that is registered under No. 9 in the books of the house-assessment Collector. All the deeds and other 'vouchers' relating to the said land having been left in mortgage at your place, Rs. 25,000, namely, twenty-five thousand, have been received (or borrowed) at interest thereon for an unlimited time."

This document was not registered, and the question arose whether the writing being inadmissible in evidence, the plaintiff

could enforce his rights as mortgagee. The question was answered in the affirmative, and Mr. Justice Bayley in giving judgment is reported to have said:—"I consider that the contract for a security on the land was created when the loan was applied for and agreed to, and the deeds were handed over to Karsandas; and that the receipt then and those subsequently given did not, nor did the Guzrati document of the 13th of June 1865, on which day Rs. 25, the last instalment of the Rs. 25,000, was advanced, create or declare any right or interest within the meaning of the Registration Acts. The rights of the parties, be they legal or be they equitable, had already been created and perfected on the 31st of October 1864, and it required no memorandum or writing to render such rights valid, nor in fact was there evidence that any such document, or any deed or writing, was on the 31st of October 1864 contemplated by the parties. Suppose the receipts and the instrument of the 13th of June 1865 had never existed, the lien or charge on the property would still, in my opinion, have been perfect and valid. The fact of such informal native document being subsequently given and executed after the transaction had been completed, cannot, I think, in any way be held to affect the validity of that which Sir Lawrence Peel, in the Calcutta case, calls *a perfected contract of pledge*, or, to borrow the words of Lord Kingsdown, was a '*contract which created between the parties a lien on the land*.'

"In general, no doubt, where a contract has been reduced into writing by the parties, the writing is the best evidence of it, and must be produced. But it is not in every case necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact has been committed to writing, it may yet be proved by parol evidence. Upon this principle a receipt for money given on unstamped paper will not exclude parol evidence of the payment, and the paper on which it is written may be produced not as evidence of itself, but as a material memorandum which a witness who saw it given may refer to, and give parol evidence of the fact of payment. (*Rambert* v. *Cohen*; 1 Taylor on evidence, p. 412, 5th ed.) So a verbal demand of goods is admissible in trover, though a demand in writing was made at the same time:—*Smith* v. *Young*. The fact, too, of birth, baptism, marriage, death, or burial may be proved by parol testimony, though a narrative or memorandum

of these events may have been entered in registers which the law requires to be kept, for the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care." (7 Bombay, 62-63.)

These cases, therefore, show that where the conduct of the parties is such as to raise the inference of a mortgage, such conduct may be relied upon, although there may be a statement of fact in writing from which the same inference may be made. If, for instance, I borrow money on the deposit of title-deeds, I may state the fact of deposit in writing, but the writing is not the only evidence of such deposit, and it may be proved by other means. If, however, a formal document is executed, I apprehend such document must be taken to be the only evidence of the transaction, although there are certain expressions in the judgment of the Bombay Court which might perhaps lead to the inference that even in such a case the parties might, so to speak, go behind the writing and rely upon the deposit coupled with the advance. If such was really the meaning of Mr. Justice Bayley, I venture to say, with great deference, that the dictum cannot be supported to that extent. The distinction is clear between a writing containing a statement of fact from which the Court may infer a contract, and a document in which the contract itself is reduced to writing.

From what I have already said it is clear that a memorandum of the description mentioned above is not a document the registration of which is compulsory. This was substantially decided in both the cases I have mentioned. I have gone at some length into the subject because I think the nature of what is called an equitable mortgage cannot be properly understood without a careful study of the distinction between mortgages of this class, and what I have called express conventional mortgages; and this distinction is very clearly brought out in the cases in which questions of the admissibility of the memorandum, which sometimes accompanies the deposit, have been raised. I have already said that an equitable mortgage, although it may be accompanied by writing, is still only a parol mortgage. It is, therefore, liable to all the disadvantages

imposed by the Registration Act on parol transactions. If the mortgage is not followed or accompanied by possession, and equitable mortgages are very seldom followed by delivery of possession, it is liable to be postponed to subsequent incumbrances which may be registered. A somewhat difficult question may perhaps arise if the memorandum is registered, but that is not generally practicable owing to the provisions of the Registration Act; Section 21 of which says,—" No document, not testamentary, relating to immoveable property, shall be accepted for registration unless it contains a description of such property sufficient to identify the same." Even if the memorandum accompanying an equitable mortgage be registered, I should venture to think that the mortgagee would not be in the same position as one who holds a registered express conventional mortgage.

MADRAS HIGH COURT.

The 18th July 1876.

PRESENT :

Sir W. Morgan, C. J. and Mr. Justice Innes.

REG *vs.* ARUNA CHELLUM* AND 2 OTHERS.†

Indian Penal Code, S 372.

To constitute an offence under Section 372 of the Indian Penal Code it is not necessary that there should have been a disposal tantamount to a transfer of possession or control over the minor's person.

THIS was an appeal against the sentences of the Session Court of Madura in Calendar Case No. 26 of 1876. The 1st prisoner, Arunachellam, was charged, under Section 372 of the Indian Penal Code‡, with having disposed of his daughter under the age

* *Vide* I. L. R., 1 Madr. 164. † Criminal Appeal No. 198 of 1876.

‡ Section 372 of the Indian Penal Code is as follows :—" Whoever sells, lets to hire, or otherwise disposes of any minor under the age of 16 years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

of 16 years, knowing it to be likely that she would be employed for the purpose of prostitution, and the 2nd and 3rd prisoners were charged with abetting the commission of the said offence. The Assessors found the prisoners guilty of the offences charged and the Session Judge, concurring with the Assessors, sentenced the 1st prisoner to six hours' simple imprisonment and to pay a fine of fifty-one Rupees, the 2nd and 3rd prisoners to the same imprisonment and to fines of five Rupees and one Rupee respectively.

The Calender of the Session Judge, P. P. Hutchins, gives the following statement of facts and reasons for the sentences passed :—

"In this case 1st prisoner presented an application for the enrolment of his daughter as a dancing girl of the great pagoda at Madura. He stated her age to be 13, and it has throughout been admitted that she is under 16. She attained puberty a month or two after her enrolment. Her father is the servant of a dancing girl, the 2nd prisoner, who has been teaching the minor dancing for some 5 years. Her father and herself lived in 2nd prisoner's house and after the ceremony returned there. The evidence shows that 2nd prisoner brought the girl to the pagoda; probably she dressed her also, but that is not admitted, and I wish only to state admitted facts; that both 1st and 2nd prisoners were present when the Bottu was tied and other ceremonies of the dedication performed; that 3rd prisoner as Battar of the temple was the person who actually tied the Bottu, which is equivalent to the Tali of an ordinary marriage, and denotes that the Dasi is wedded to the idol. There is the usual evidence that dancing girls live by prostitution, though occasionally being kept by the same man for a year or more; but the fact being admitted, it was not necessary to multiply witnesses upon this point.

I took a special verdict *from* the assessors. It runs as follows :—

"We find that Kistnammál is under 16; that 1st prisoner, her father, got her made into a Dasi by the tying of the Bottu; that Dásis universally get their living by prostitution; that her father knew she was likely to be employed for prostitution; that she was likely to become a prostitute before she attained the age of 16; and that her father knew that."

"We also find that 2nd prisoner abetted the above acts, and that 3rd prisoner also abetted them."

In that verdict I entirely concur.

As to the law, I have held in a former case that there must have been a disposal tantamount to a transfer of possession or control over the minor's person to constitute an offence under this section, but the Bombay High Court have held the contrary*, and I consider myself bound by their decision on any points of statutory construction not inconsistent with the decision of the Madras High Court. I have, therefore, convicted, but my former judgment has doubtless been accepted by these people as declaratory of the law, and has led them to believe their acts innocent. The case, therefore, only calls for a nominal sentence."

The prisoners appealed to the High Court on the ground that the conviction was contrary to law.

The appeal came on for hearing on the 18th of July 1876, when Mr. *Tarrant* appeared for the prisoners and contended that the conviction was wrong, as a disposal tantamount to a transfer of possession or control over the minor's person should be shown in order, constitute an offence under Section 272.

The High Court affirmed the convictions.

CALCUTTA HIGH COURT.

The 30th July 1877.

PRESENT :

The Hon'ble W. Markby and the Hon'ble H. J. Prinsep, *Judges.*

PUDDO LOCHUN PANIA, *Petitioner.*

Sec. 523 *and s.* 518 *of the Criminal Procedure.*

In a case under Chapter 39 of the Criminal Procedure Code, the Magistrate is bound to base his order upon the finding of the Jury. An order under Section 518 should be passed only under special and emergent circumstances calling for immediate action.

On complaint to the Sub-divisional officer of Attea that a certain public road had been unlawfully closed, the matter was referred for enquiry by a Sub-Deputy Magistrate on whose report the Sub-divisional Magistrate on the 19th December passed the following order.

* 6 Bom. H. C. Reps., C. C. 60.

"The road shall be immediately repaired by the accused and
" the house removed. I am quite satisfied from the report of the
" Sub-Deputy Magistrate that the case calls for action under
" Section 518 C. C. P."

The opposite party called "the accused" then appeared and applied for a jury under Section 523 and five persons were accordingly appointed.

On receipt of their report, the Sub-divisional officer on the 7th April referred the matter for the orders of the Magistrate of the District who returned the case, remarking that the Sub-divisional Magistrate had equal powers with himself to deal with it.

The Sub-divisional Magistrate thereupon passed the following order: "As the Punchaet substantially acknowledges that the road is a public one, though inconvenient to the obstructor's privacy, I hereby order it to remain open."

Application is now made to us to set aside this order as contrary to law inasmuch as it does not give effect to the finding of the Jury.

We have heard the report made by the members of the Jury who were not unanimous and we have no doubt, that the opinion of the majority is not in accordance with the final order passed by the Sub-divisional officer and that he did not really consider it to be so is clear from his report to the District Magistrate already mentioned, for he states, "the Jury decided that the obstruction was
" justified and was not a public obstruction," and again, "I feel
" it necessary to take this action as if the present Jury which seems
" neither partial nor intelligent is maintained, any village road may
" be blocked up by an influential man who wants to make a house."

We find it difficult to understand how the Sub-divisional Magistrate having thus written on 7th April can on the 19th of the same month state that "the Punchaet substantially acknowledges that
" the road is a public one though inconvenient to the obstructor's
" privacy." It seems to us that he was influenced by the report of the Sub-Deputy Magistrate and by what he had himself seen of the road in dispute and had determined in spite of the law not to give effect to the opinion of the majority of the Jury because it was not in accordance with what he deemed the just decision of the matter.

This it is quite clear the Magistrate was not competent to do. He is bound to base his order upon the finding of the Jury in a case under Chapter 39, for the Jury are specially appointed to decide whether the order of the Magistrate is a reasonable and proper order and the Magistrate obviously cannot properly adhere to his former order when a Jury has decided that it is not reasonable or proper, except possibly in certain cases coming under Section 528.

But in the present case we are unable to do otherwise than set aside all the proceedings taken. The original order was passed under Section 518 and was an illegal order, because there is nothing in the report of the Sub-Deputy Magistrate on which the Magistrate relies, to justify an order under that Section which can be passed only under special and emergent circumstances calling for immediate action. No further order was passed under Section 521 nor do we find that any order was expressly referred to the Jury as is required by Section 523 for them to try whether it was a reasonable or proper order.

Lastly, we find the terms of the report of the majority of the Jury to be so ambiguous, probably because they had not tried the proper issue, whether the order was a reasonable or proper one, because it had never been referred to them, that we are unable to decide what was the real purport of their finding, though no doubt there is some indication of a tendency to find that it was a road kept up only by private arrangement between the parties concerned. We are however of opinion that the finding is not so clear or precise that its purport can be unmistakably determined and given effect to, and as we hold further that the entire proceedings are bad, we quash them ab inito. If the present Magistrate should still think it necessary to settle this matter, he should regularly proceed under Section 521.

BOMBAY HIGH COURT.

The 24th August 1876.

PRESENT:

Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

REG *v.* GAJI KOM RANU.*

Criminal Procedure Code (Act X, of 1872), *Sections* 197, 472 *and* 473—*Contempt of Court—False evidence—Commitment—Sentence.*

Giving false evidence is "an offence committed in contempt of the authority" of a Court within the meaning of Section 473, of Act X of 1872. *Reg.* v. *Navranbeg* (10 Bom. H. C. Rep. 73) and the ruling in 7 Mad. H. C. Rep., App. XVII, followed. *Queen* v. *Kultaran Singh*, I. L. R., 1 All. 129 and *Queen* v. *Jagut Mull, ibid*, 162, dissented from.*

Where the accused was by a Magistrate, First Class, committed for trial by the Sessions Court on a charge of having given false evidence in a judicial proceeding before the Sessions Judge, there being no Assistant Sessions Judge or Joint Sessions Judge.

Held that the commitment could not be quashed, there being no error in law and the case must, therefore, be transferred for trial to another Court of Session.

In such a case as the above the better course would be for the Magistrate to try the case himself, and, if he is incompetent to pass a sufficient sentence, for the Sessions Judge to refer the case to the High Court for enhancement of sentence.

THE accused Gaji Kom Ranu was charged with having given false evidence in a judicial proceeding before A. Bosanquet, Sessions Judge of Ahmednagar. The preliminary enquiry was made by T. S. Hamilton, Magistrate, First Class, who committed her for trial before the same Sessions Judge. Mr. Bosanquet, therefore, submitted the case for the orders of the High Court, as he had no jurisdiction to try it under Section 473 of the Criminal Procedure Code, the offence having been committed in his own Court.

MELVILL, J.:—The Sessions Judge of Ahmednagar being debarred by Section 473 of the Code of Criminal Procedure from trying an offence committed in contempt of his own authority, the

---

* *Vide* I. L. R; 1 Bombay 311.

† See also the case of *Sufatoolah* (22 W. R. Cr. 49) in which the Calcutta High Court took the opposite view to that taken in the present case.

case of the *Queen* v. *Gaji*, wife of Ranu, is under the provisions of Section 64 of the Code, ordered to be trasferred for trial to the Sessions Court of Poona.

If it were not for the peculiar wording of Section 473 of the Code of Criminal Procedure, we should have hesitated to accept the broad proposition laid down in *The Queen* v. *Navranbeg*‡ that the offence of giving false evidence is to be regarded as a contempt of Court. But (notwithstanding some rulings of the Allahabad Court to the contrary)|| we agree with the Madras High Court,§ that the Legislature has, by most inapt words, extended the prohibition contained in Section 473 to the offence of giving false evidence, and that consequently a Sessions Judge cannot try any person for such an offence committed before himself.

It follows that, in cases like the present, in which a Magistrate commits a person for trial before the Sessions Court for the offence of giving false evidence before the Sessions Judge, the case cannot be tried by the Sessions Court, unless there be an Assistant Sessions Judge or a Joint Sessions Judge to whom the case can be referred. In Ahmednager there is no such officer. The commitment cannot be quashed, as there is no error in law (Criminal Procedure Code, Section 197). The only remedy, therefore, is to order the transfer of the case for trial to another Court of Session.

It is obvious that such a proceeding involves much inconvenience and hardship to witnesses. It would be better that, in all such cases arising in districts in which there is no Assistant or Joint Sessions Judge, the Magistrate should try the case himself, and that if the sentence which the Magistrate is competent to pass is insufficient, the Sessions Judge should refer the case to the High Court for enhancement of sentence.

It is to be hoped that the attention of the Legislature will be directed to the defect in the law which creates this difficulty, and which appears to have been the result of an oversight. When Section 172 of Act XXV of 1861 was reproduced *verbatim* in Section 472 of the Code of Criminal Procedure, it was, no doubt, the intention of the Legislature that the new section should have

‡ 10 Bom. H. C. Rep. 73.

|| *Queen* v. *Kulkaran Singh*, *I. L. R.*, 1 All. 129 and *Queen.* v. *Jugat Mull*, *ibid* 162.

§ See Proceedings, 24th March 1873, 7 Mad. H. C. Rep., Appx. XVII.

the same effect as the old, and that a Court of Session should be able to charge a person for giving false evidence before itself. But this intention has been defeated by the change which has been made in the Schedule of the Code, rendering the offence of giving false evidence triable by a Magistrate of the First Class, and no longer "by the Court of Session exclusively."

Note—It was held in *Reg.* v. *Gulabdas* (11 Bom. H. C. Rep. 98) that an offence committed in contempt of the Session Judge's authority was cognizable by the Assistant Sessions Judge.

MADRAS HIGH COURT.

The 5th December 1876.

PRESENT:

Sir W. Morgan, C. J. and Mr. Justice Innes.

REG *v.* SAMIA KAUNDAN.*

Indian Penal Code, Sections 363 *and* 116—*Abetment of Kidnapping.*

Accused was convicted by the Magistrate of abetting the kidnapping of a minor. Accused knowing that the minor had left home without the consent of his parents, and at the instigation of one Komaren, the actual kidnapper, undertook to convey the minor to Kandy in Ceylon and was arrested on the way thither. The Sessions Judge reversed the conviction on the ground that there was no concert between the accused and Komaren previous to the completion of the kidnapping by the latter. *Held* by the High Court, that so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted, and that in the present case the conviction should be of an offence punishable under Sections 363 and 116 of the Penal Code.

Upon reading the records in Appeal Case No. 14 before the Court of Session of Salem, Counsel not appearing, the High Court made the following

RULING.—In this case the Deputy Magistrate convicted the accused of abetting the kidnapping from lawful guardianship of a lad of 11 or 12 years of age and sentenced him under Sections 363 and 109 of the Indian Penal Code to be rigorously imprisoned for nine months.

The actual kidnapping is stated to have been committed by one Komaren, a brother-in-law of the accused.

---

* *Vide* I. L. R., 1 Madras p. 173.

The accused knowing that the lad had left home without the consent of his parents, and at the instigation of Komaren, undertook to convey the lad and another boy to Kandy in Ceylon, and had proceeded on the way as far as Trichinopoly, when he was arrested.

On appeal the Sessions Judge has reversed the conviction of abetting the offence of kidnapping on the ground that there was no concert between the accused and Komaren previous to the completion of the kidnapping by the latter.

The High Court are of opinion that so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted.

The evidence however shows that the kind of kidnapping attempted was kidnapping from British India, and, as the attempt failed, the conviction should be of an offence punishable under Sections 363 and 116 (not 109).

The order of the Sessions Judge reversing the conviction is annulled. The accused Samia Kaundan is convicted of an offence punishable under Sections 363 and 116 of the Penal Code, and is sentenced to be rigorously imprisoned for six months.

CALCUTTA HIGH COURT.

The 12th July 1877.

PRESENT :

The Hon'ble W. Ainslie and W. F. McDonell V. C.

Confession to a Police Officer.

'A Police Officer' in Section 25 of the Evidence Act, means any Police Officer whether in any way connected with the investigation of the case or not. Section 25 excludes confessions made to a Police Officer under any circumstances.

We think that the conviction in the present case must be set aside. That conviction is substantially based upon the statement made by the accused to one Mosun Ali, the Sub-Inspector of Thanah Abidabad.

The Judge says that "it is perfectly true that Mosun Ali is a Police Officer, but it appears from his evidence that he had come to Sylhet to give evidence in another case, that he was in no way connected with the investigation of this case, and that the appellant came to him as to a personal friend and asked his evidence of his own accord."

The 25th Section of the Evidence Act says, without limitation or qualification, that "no confession made to a Police Officer shall be proved as against a person accused of any offence."

It has been contended that this section is to be read as if it ran "no confession made to a Police Officer investigating the case;" in the present instance the Police Officer to whom the confession was made did not even belong to the same Police Division; that he was only casually brought into contact with the accused, and that therefore this Section cannot apply. It appears to me that section 26 shews that this is not the true construction of the 25th Section. That Section deals with confession made in the presence of a Police Officer who has the custody of an accused person, that is, of a Police Officer who is concerned more or less in the investigation of the case; and those confessions are absolutely excluded whether made to a Police Officer or to any other person unless made in the immediate presence of a Magistrate. This Section would necessarily include the 25th Section if it is to be read as suggested and thus make it useless. But this could not be intended and, therefore, it is clear that the proper construction is one that excludes confessions to a Police Officer under any circumstances or to any one else while the person making it is in a position to be influenced by a Police Officer unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of a Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the Police.

In the case reported in 1 Indian Law Reports, page 207, the learned Chief Justice expresses the opinion that the term "Police Officer" should be read not in a strict technical sense but according to its more comprehensive and popular meaning. In that case although it was admitted that the confession was made to Mr. Lambert at a time when he was not acting as a Police Officer but as a Magistrate and that there was no danger that a gentleman in Mr. Lambert's position would extort a confession, the Court considered itself bound to give the accused the benefit of the literal construction of the words of Section 25. It seems to me that we could not venture to adopt the view of the law contended for by the learned Junior Government Pleader without opening the door to perversion of the intentions of the Legislature.

The Petitioner will be discharged from bail.

PRIVY COUNCIL.

The 17th and 18th April 1877.

PRESENT:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier.

BARON FORESTER AND WIFE (Widow of D. O. DYCE SOMBRE), and another ... ... *Plaintiffs,*

and

SECRETARY OF STATE FOR INDIA IN COUNCIL ... *Defendant.*

AND CROSS APPEAL.

On appeal from the Chief Court of the Punjab.

Interest on Costs cannot be given in execution unless decreed.

Where an order of the Judicial Committee is silent as to interest upon the costs decreed, the Judge of the lower Court which has to execute the decree has no power to direct payment of those costs with interest.

The existing practice of the Indian Courts not to give in execution interest on costs unless specially decreed, or unless submission is made by the parties to the discretion of the Court, approved.

SIR JAES W. COLVILE.—(In delivering the judgment of their Lordships said :—) It is not necessary for their Lordships to consider from what other date interest should be calculated, because they are of opinion that the Chief Court of the *Punjab* is right in its conclusion; that where the Order in Council is silent as to interest upon the costs decreed, the Judge of the Indian Court which has to execute the decree has no power to direct payment of those costs with interest.

The learned counsel for the Appellants relied upon what they said had been the course of practice in *India*. In determining what is the existing practice in *India*, their Lordships think they ought first to consider what are the statutory provisions which govern the present procedure of the Courts in *India*. Those which are material to the present question are to be found in the 10th and 11th sections of Act XXIII. of 1861. The words of the 10th section are, "When the suit is for a sum of money due to the Plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of suit to the date of the decree, in addition to any interest

adjudged on such principal sum for any period prior to the date of suit, with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." This clause seems to give the Courts a discretionary power to allow interest on costs, rather than to make it imperative upon them to do so. The learned counsel for the Plaintiffs, however, relied on certain decisions of the High Court of *Bengal*, which they said established that an order for costs necessarily implied that the party in whose favour they were decreed might take out execution for them, with interest from the date of the decree to the date of payment. It appears, however, that the more recent and authoritative decisions upon the 11th section of Act XXIII. of 1861 are the other way. It is sufficient to mention the case reported in the 6th *Weekly Reporter* at page 109, which was a decision of the Full Bench of the High Court of *Bengal*; and that before Mr. Justice *Bittleston*, which is reported in the 3rd *Madras* High Court Reports, page 421. Those cases seem to have established as to decrees of Indian Courts that the Judges of the subordinate Courts executing those decrees have no right to allow interest unless the decree which is to be executed has specifically directed the allowance of that interest. It was said that these cases or some of them related to the principal moneys decreed, or to mesne profits; but so far from there being any authority in favour of a distinction between these and costs, the case of *Rodger* v. *The Comptoir d' Escompte de Paris** is an authority for the proposition that a claim for interest on costs in that respect is less favoured than a claim for interest on the principal money decreed. Since the before-mentioned cases have been determined as to the practice of the Courts of *India* and the powers of the Judges executing decrees of those Courts, the power of a subordinate Court executing an Order of Her Majesty in Council has also been considered in the two cases cited from the *Weekly Reporter*, in which judgment was given by Mr. Justice *Mitter*; and it appears, that as to Orders in Council as well as to decrees of the Indian Courts, the existing practice is that interest cannot be given in execution unless it is specially directed to be given.

It appears to their Lordships that the principle of the decisions which have established this practice is sound, and that the Plaintiffs

* 7 Moo. P. C. (N. S.) 331; Law Rep. 3, P. C. 465.

have failed to shew that the order made by the Chief Court of the *Punjab* is erroneous, in that it has refused to allow interest on the sum of Rs. 12,354. 12*a*.

* * * * * *

CALCUTTA HIGH COURT.

The 19*th and* 22*nd March* 1877.

PRESENT :

Mr. Justice White.

IN THE MATTER OF THE EMPRESS OF INDIA ON THE PROSECUTION OF MALCOLM* *v.* GASPER AND OTHERS.

High Courts' Criminal Procedure Act (*X of* 1875), *s.* 147—*Transfer of Case before Police Magistrate to High Court—Power to issue Mandamus.*

A charge was made against the accused of using criminal force under s. 141 of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and without disbelieving it, decided it did not amount to the offence charged. *Held* that, assuming that an error of law had been committed, the High Court had no power to issue a *mandamus* to the Magistrate to commit the defendants ; it was not a case where the Magistrate had declined jurisdiction ; he had exercised his jurisdiction and heard the case. *Held* also, it was not a case which the Court could transfer under s. 147 of the High Courts' Criminal Procedure Act.

WHITE, J.—I have, in the course of the argument, stated my views so fully that it is unnecessary to do more than recapitulate the reasons for my decision.

Mr. Phillips, on behalf of the prosecution, applies, on affidavit, for one of two orders—either for a rule under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), calling on the Magistrate to show cause why these proceedings should not be transferred to this Court for hearing and final determination, or for a *mandamus* to compel the Magistrate to commit on a charge of being a member of an unlawful assembly under s. 141 of the Penal Code.

When the case came before me on the first occasion, I was informed that the Police Magistrate, having heard the evidence, did not disbelieve the facts proved, but thought that they did not amount to the offence with which the defendants were charged, and,

* *Vide* I. L. R. 2. Calcutta Series, p. 278.

therefore, declined to commit them for trial. When I heard that such was the nature of the case, I requested Mr. Phillips to refer me to some authority for my granting his application. He has not brought before me, however, any authority which shows that either the Court of Queen's Bench, or this Court, has ever issued a *mandamus*, or granted a *certiorari*, in a case similar to the present one. He has, indeed, referred me to two cases, *The Queen* v. *Adamson** and *The King* v. *The Justices of Kent* † in which the Court of Queen's Bench granted a writ; in the first case, ordering the Justices to hear and determine a case which they had refused to hear; and in the second case, ordering them to issue a summons, which they had refused to issue. But both these cases, when examined, show that the Court of Queen's Bench does not issue a *mandamus* in such cases unless the inferior Court has actually declined jurisdiction, or has acted under circumstances which amount practically to declining jurisdiction. Now in this case the Magistrate has not declined to exercise jurisdiction. He has heard the evidence in the case, and has come to the conclusion that no offence under the Penal Code has been committed. He has, in fact, exercised his jurisdiction, and decided the case in favor of the defendants. This is sufficient to dispose of the first branch of Mr. Phillips' application. Quite irrespective, however, of this, I may state that a *mandamus* could not issue in the form asked for; if it issued at all, it would go not to order the Magistrate to commit, but to order him to hear the case again, and upon a sufficient case being made out, then to commit.

As to the second branch of the application, which is to transfer the case to this Court under s. 147 of Act X of 1875, I think I am equally without power to deal with the case in the way I am asked to do. That section provides, that "whenever it appears to the High Court that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case, and shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only." The present case is not, I think,

* 1 Q. B. D. 201.
†14 East, 395.

within the purview of the section. If I transferred it, I should be doing so not for the purpose of quashing or affirming a conviction or other proceeding, but for the purpose of hearing the case, taking the evidence of the witnesses, and myself determining whether a case for committal had been made out or not. I think the section is not wide enough to enable me to do that, and I should be extending the section beyond the intention of the Legislature if I put it in force to transfer such a case as this.

I can well imagine that the refusal of a Magistrate to commit may now and then result in a grievous failure of justice, but if the Legislature intended to provide for such a case, the Court should have been specifically armed with power to deal with such case. I cannot infer such a power in the absence of express words. I am, therefore, unable to grant this application. I have assumed throughout these remarks that an error of law has been committed, but I have made that assumption only for the purposes of the argument. Considering the law bearing on the application to be such as I have stated, I have thought it unnecessary to hear the affidavit. The refusal to commit is not tantamount to an acquittal, and the prosecution can, if they choose, go before the Magistrate again, though I am by no means saying they ought to do so. The application must be refused.*

CALCUTTA HIGH COURT.

The 19th and 23rd April 1877.

PRESENT:

Mr. Justice Macpherson.

THE CORPORATION† OF CALCUTTA *v.* BHEECUNRAM NAPIT *alias* BHEECUN NAPIT.

High Courts' Criminal Procedure Act (X of 1875), s. 147—Acquittal—Presidency Magistrates' Act (IV of 1877). s. 181—The Calcutta Municipal Act. Beng. Act IV of 1876, ss. 75—79.

The powers of interference given to the High Court by s. 147 of the High Courts' Criminal Procedure Act, were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured.‡

* See *Corporation of Calcutta* v. *Bheecunram Napit, post.*
† *Vide.* I. L. R, 2. Calcutta Series p. 291.
‡ See *Malcolm* v. *Gasper, ante p.* 278.

In this case, the defendant was accused of carrying on a profession within the town of Calcutta without taking out a license under Act (Beng.) IV of 1876. The defendant urged that as that Act came into force on the 1st July 1876, he had offered to pay half the license fee chargeable for the year and was not further liable.* The license officer, however, refused to accept a sum less the fee for the whole year. The Magistrate who heard the case was of opinion that the defendant's liability only commenced from the 1st of July 1876 and that as he offered to pay the fee for the latter half of 1876 and was still willing to pay it, he incurred no penalty, and was discharged. The present application was made either for the transfer of the case to the High Court or for a *mandamus* to compel the Magistrate to commit.

MACPHERSON, J.—I am of opinion that s. 147 gives me no power to grant this application. The object in fact is to appeal against an acquittal. But s. 147 does not provide for such an appeal. It contemplates the transfer of a case before disposal, or interference on behalf of persons aggrieved or injured by an order of the Magistrate. But there was no intention to give power to interfere in order to set aside an acquittal. If it had been intended to give that remedy, it would, no doubt, have been expressly given, as in the Criminal Procedure Code and in the Presidency Magistrates' Act IV of 1877. One section of the latter Act (s. 181) really shows that s. 147 was intended to apply only where there has been a conviction, for it makes notice to the Government prosecutor necessary before an application can be made under s. 147.

Even, however, if I had the power to interfere, I would not exercise it in such a case as this.

Application refused.

CALCUTTA HIGH COURT.

The 11*th December* 1876 *and* 20*th February* 1877.

FULL BENCH.

PRESENT:

Sir Richard Garth, *Kt. Chief Justice*, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

CHUNDER NATH SEN* and another, *Petitioners.*

*Superintendence of High Court—*24 *and* 25 *Vict., c.* 104, *s.* 15—*Order under Criminal Procedure Code (Act X of* 1872), *s.* 518.

The High Court cannot interfere, under s. 15 of the Charter Act, with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code.

The opinion of the Full Bench was delivered by

GARTH, C, J,—As the Magistrate states that riot or affray was imminent, and that he considered that the direction he gave tended to prevent, and was likely to prevent, a riot or affray, and as the facts stated by the Magistrate show that there were some grounds for the opinion which he expressed, we think that he had power, under s. 518 of the Criminal Procedure Code, to make the order complained of. This Court, therefore, cannot interfere with it under s. 15 of the Statute 24 and 25 Vict., cap. 104; nor can the Court interfere on any other ground, as by s. 520 the order made is declared not to be a judicial proceeding, however much it may infringe upon what are, or may be (irrespective of this section), the undoubted legal rights of the petitioners.

Petition dismissed.

NEW AND OLD CIVIL PROCEDURE CODES COMPARED.

Messrs. Higginbotham & Co., of Madras, have lately published a very small but fine pamphlet entitled "COMPARATIVE TABLES exhibiting in juxtaposition, numbers of sections of the new CIVIL PROCEDURE CODE, Act X of 1877, and of the old Code Act No. VIII of 1859 and other sundry Acts and *vice versâ* by Taloor Swamy Row, Head Clerk, District and Sessions Court, Bellary." The object of the author in making the publication is to facilitate references. We think that this little and unpretending contribution will at present be of considerable service to the Bar as well as to the Bench in helping them to find out the decisions applicable to each section of

* *Vide* I. L R. 2. Calcutta, p. 293.

the New Procedure Code, inasmuch as it is not likely that Mr. Broughton or Mr. Field will be able to bring out their valuable annotations before the expiry of the current year, and since the new Code having come into operation, the Bench and the Bar are in great need of references to correctly understand and apply the sections of the new Code. The price of the book is only six annas. In order to show to our readers the usefulness of the work under notice we make the following extracts :—

LIST OF ABBREVIATIONS.

A. C. P.—Amended Code of Civil Procedure (Act XXIII of 1861.)
B. E. A.—Bill of Exchange Act (V of 1866.)
M. S. A—Mofussil Small Cause Court Act (XI of 1865.)
Rep—Repealed by former enactments.

PART I.

The following Table exhibits the numbers of Sections of the new Civil Procedure Code (Act X of 1877) and the numbers of corresponding Sections of the old Code (Acts VIII of 1859 and XXIII of 1861), the Mofussil Small Cause Court Act (XI of 1865) and the Bill of Exchange Act (V of 1866) arranged in the order of Sections of the New Act.

Sections of new Act.	Sections of old Act.
1	42 A. C. P. 387 385
2	386 41 A. C. P.
3 para.3	387
5	47 M. S.A.
6	383
7	384
8	382
10	4
11	1
13	2
15	6

Sections of new Act.	Sections of old Act.
16	5
17	5
	4 A. C. P.
	8 9 M.S.A. 10
19	11 12
20	4 A. C. P.
22	11
23	12
24	13
25	6
32	73

Sections of new Act.	Sections of old Act.
35	115
36	16
37	17 cl. 1 & 2
38	17 latter pt.
39	18
40	18
41	50 51
43	7
44 rule (*a*)	10
45	8 9
48	25

Sections of new Act.	Sections of old Act.
49	26
50	26
51	27 28
52	27
53	29
54	31 32
56	36
57	30 3 A. C. P.
58 last para.	38

PART I.—(*continued.*)

Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.
59	39	111	121	192	173	249	217
61	14 B. E. A.	112	122	198	183	250	221
62	39	114	123	200	184	251	222
63	39	115	123	201	185	252	203
64	41	116	124	202	185	253	204
66	42	118	125	203 para. 2	185	254	201
67	42	119	125	204	186	256	13 A. C. P.
68	41	120	127	205	189	257	206
69	45	137	138	206	189	258	206
70	43	138	128	207	190	259	200
72	47	139	128	208	191	260	200
73	48	140	129	209	10 A. C. P.	261	202
74	48	141	132	210	194	262	202
75	49	142	134	211	196	263	199, 223
76	11 M. S. A.	143	134	212	197	264	224
77	61	144	135, 136, 137	216	195	265	225
78	53	146	139	217	198	266	205 and bracketed part of 273 & 280.
79	54	147	139	219	187	267	219
80	54, 55	148	140	220	187	268	234, 236, 241
81	56	149	141	223 last par.	286	269	233
82 2nd para.	57	150	142	224	285, 286	270	238
83	57	151	143	225	286	272	237
84	58	152	144	226	287	274	235, 239
85	59	154	145	228	287, 289, 294	275	245
89	60	155	145	229	284	276	240
91	64	156	146	230 para. 1	207	277	242
92	65	157	147	231	207	278	246, 247
93	2 A. C. P.	158	148	232	208	280	246
96	109	159	149	234	210, 211	281	246
97	5 A. C. P.	160	151	235	212	283	246, 247
98	110	161	151	236	214	284	242
99	110, 7A. C. P.	162	151	237	213	286	248
100 (*a*)	111	163	152	238	213	287	249
(*b*)	112	164	153	239	290	289	249
(*c*)	113	165	171	240	291	290	249
101	111	167	154	241	293	293	254
102	114	168	159	242	292	295	270, 271
103	114, 119	169	160	243	209 last para.	296	248
104	60	170	160	244	11 A. C. P.	297	251
105	116	171	9 A. C. P.	245	15 A. C. P.		
106	116	172	167	246	209		
107	117	174	168	248	216		
108	119	175	168				
109	119	176	175				
110	120	177	170				
		181 to 190	172				

PART I—(*continued.*)

Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.
298	252	361	99	419	52	510	319
299	266	362	100	420	67	511	319
300	262	363	101	421	67	512	319
301	265	364	101	422	62	513	317
302	267	365	102		68	514	318
303	261	366	102	423	69	515	318
305	243	367	103	426	70	516	320
306	253	368	104	427	71	517	321
307	254	369	105	428	72	518	322
308	254	370	106	429	201	519	322
309	255	373	97	432	17 cl. 4	520	323
310	14 A. C. P.	374	97	435	28	521	324
311	256	375	98	436	63	522	325
312	257	380	34		46	523	326
314	256		35	465	19	524	326
315	258	381	34	466	20	525	327
316	259		35	467	20	526	327
	260	383	175	468	62	527	328
317	260	384	175	469	295	528	328
318	263	385	175	477	74	529	329
319	264	386	175		80	530	330
326	244		176	478	75	531	331
328	226		72		80	532	2 B. E. A.
329	227	387	177	479	76	533	3 do.
330	228		178		77	534	4 do.
331	229	389	179	480	24 A. C. P.	535	5 do.
332	230	390	179	481	78	536	6 do.
333	231	392	180	483	81	537	7 do.
334	268	393	180		82	538	8 do.
335	269	394	181	484	83	540	23 A. C. P.
339	276	395	181	485	84	541	333
340	279	397	182	486	85		334
341	278	398	180	487	86		335
	282	399	180	488	87	542	334
342	278	400	180	489	89	543	336
344	273		181	491	79	544	337
	280	401	297		88	545	338
345	273	402	298	492	92	546	36 A. C. P.
	280	403	299	493	93	547	340
346	273		300	494	95	548	341
	280	404	301	496	93	549	342
347	281	405	302	497	96	550	343
349	8 A. C. P.	406	303	501	91	552	344
350	8 A. C. P.	407	304	503	92	553	345
351	281	408	305	504	92	554	345
	8 A. C. P.	409	306	506	312	556	346
357	282	410	308		313	557	6 A. C. P.
358	282	411	309	507	314	558	347
359	275	413	310	508	315	561	348
	281	417	17 cl. 3	509	316	562	351

PART I—(*continued.*)

Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.
564	352	581	361	590	366	622	35 A. C. P.
565	353	582	37 A.C.P.	591	363 364	623	376
566	354	583	362	592	367 370	626	378
567	354	584	372	593	370	627	379
568	355	586	27 A.C.P.	617	28 A.C.P. 22 M.S.A.	629	378
569	356	588 cl. (*e*)	36	618	29 A.C.P. 23 M.S.A.	630	380
570	357	" (*f*)	119	619	32, 33 A. C. P. 25, 26 M. S. A.	640	21
571	349 359	" (*j*)	11 A.C.P.	620	34 A.C.P. 27 M.S.A.	641	22
572	359	" (*l*)	11 A.C.P.	621	28 M. S. A.	643	16, 17 & 19 A. C. P.
573	359	" (*m*)	257			646	42 M. S. A.
574	359	" *r*(479)	76			647	38 A. C. P.
575	23 A. C. P.	" "(492	94			649	296
576	359	" "(493)	94			650	220
577	350	" "(496)	94			652	40 A. C. P.
578	350	" "(503)	94				
579	360	" (*t*)	325				
580	360	" (*u*)	365				

PART II.

Numbers of Sections of the Revised Act (X of 1877) which have been newly enacted.

4	86	199	288	378	482	589
9	87	203 para 1.	291	379	490	594 to 616
12	88	213	292	382	495	
14	90	214	294	388	498	624
18	94	215	304	391	499	625
21	95	218	313	396	500	628
26 to 31	113	221	320 to 325	412	502	631 to 639
33	117	222	327	414	505	642
34	121 to 136	223 except last para.	336	415	5[illegible]9	
					551	
42	145		337	416	555	644
44 rule (b)	153	227	338	418	559	645
46	166	230 except para 1	343	424	560	648
47	173	233	348	425	563	651
55	178	247	352 to 356	430	585	
58 except last para.	179	255		431	587	
	180	271	360	433	588 clauses *a, b, c, d, g, h, i, k, n, o, p, q, s, v, w.*	
60	191	273	371	434		
65	193	279	372	437 to 464		
71	194 to 197	282	376	470 to 476		
82 first para.		285	377			

PRINCIPLES OF THE INDIAN PENAL CODE.

(As explained by the original framers and laid before the Governor-General of India in Council in the year 1837.)

NOTE A.

ON THE CHAPTER OF PUNISHMENTS.

First among the punishments provided for offences by this Code stands death. No argument that has been brought to our notice has satisfied us that it would be desirable wholly to dispense with this punishment. But we are convinced that it ought to be very

sparingly inflicted, and we propose to employ it only in cases where either murder, or the highest offence against the State has been committed.

We are not apprehensive that we shall be thought by many persons to have resorted too frequently to capital punishment. But we think it probable that many even of those who condemn the English statute book as sanguinary may think that our Code errs on the other side. They may be of opinion that gang-robbery, the cruel mutilation of the person, and possibly rape, ought to be punished with death. These are doubtless offences which, if we looked only at their enormity, at the evil which they produce, at the terror which they spread through society, at the depravity which they indicate, we might be inlcined to punish capitally. But atrocious as they are, they cannot, as it appears to us, be placed in the same class with murder. To the great majority of mankind nothing is so dear as life. And we are of opinion that to put robbers, ravishers, and mutilators on the same footing with murderers is an arrangement which diminishes the security of life.

There is in practice a close connection between murder and most of those offences which come nearest to murder in enormity. Those offences are almost always committed under such circumstances that the offender has it in his power to add murder to his guilt. They are often committed under such circumstances that the offender has a temptation to add murder to his guilt. The same opportunities, the same superiority of force, which enabled a man to rob, to mangle, or to ravish, will enable him to go further and to dispatch his victim. As he has almost always the power to murder, he will often have a strong motive to murder, inasmuch as by murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment of murder, he will have no restraining motive. A law which imprisons for rape and robbery, and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which only hangs for murder, holds out, indeed, if it be rigorously carried into effect, a strong motive to deter men from rape and robbery, but as soon as a man has ravished, or robbed, it

holds out to him a strong motive to follow up his crime with a murder.

If murder were punished with something more than simple death, if the murderer were broken on the wheel, or burned alive, there would not be the same objection to punishing with death those crimes which in atrocity approach nearest to murder. But such a system would be open to other objections so obvious that it is unnecessary to point them out. The highest punishment which we propose is the simple privation of life; and the highest punishment, be it what it may, ought not, for the reason which we have given, to be assigned to any crime against the person which stops short of murder. And it is hardly necessary to point out to his Lordship in Council how great a shock would be given to public feeling if, while we propose to exempt from the punishment of death the most atrocious personal outrages which stopt short of murder, we were to inflict that punishment even in the worst cases of theft, cheating, or mischief.

It will be seen that, throughout the Code, wherever we have made any offence punishable by transportation, we have provided that the transportation shall be for life. The consideration which has chiefly determined us to retain that mode of punishment is our persuasion that it is regarded by the natives of India, particularly by those who live at a distance from the sea, with peculiar fear. The pain which is caused by punishment is unmixed evil. It is by the terror which it inspires that it produces good: and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance: but it is not so much dreaded before hand: nor does a sentence of imprisonment strike either the offender or the by-standers with so much horror as a sentence of exile beyond what they call the Black Water. This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict. The separation resembles that which takes place at the moment of death. The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the natives have but an indistinct notion over an element which they regard with extreme awe, to a distant country of which they know nothing, and from which he is never to return. It is natural that his fate

should impress them with a deep feeling of terror. It is on this feeling that the efficacy of the punishment depends, and this feeling would be greatly weakened if transported convicts should frequently return, after an exile of seven or fourteen years, to the scene of their offences, and to the society of their former friends.

We may observe that the rule which we propose to lay down is already in force in almost every part of British India. The Courts established by the Royal Charters, and Courts Martial, are at present the only Courts which sentence offenders to transportation for any term short of life. In the case of European offenders who are condemned to long terms of imprisonment, we allow the Government to commute imprisonment for transportation not perpetual. But in that case we are of opinion that in general the transported criminal ought not, after the the expiration of the term for which he is transported, to be allowed to return to India. This rule and the reasons for it will be considered hereafter.

Of imprisonment we propose to institute two grades; rigorous imprisonment and simple imprisonment. But we do not think the Penal Code the proper place for describing with minuteness the nature of either kind of punishment.

We entertain a confident hope that it will shortly be found practicable greatly to reduce the terms of imprisonment which we propose. Where a good system of prison-discipline exists, where the criminal, without being subject to any cruel severities, is strictly restrained, regularly employed in labor not of an attractive kind, and deprived of every indulgence not necessary to his health, a year's confinement will generally prove as efficacious as confinement for two years in a gaol where the superintendence is lax, where the work exacted is light, and where the convicts find means of enjoying as many luxuries as if they were at liberty. As the intensity of the punishment is increased its length may safely be diminished. As members of the committee which is now employed in investigating the system followed in the gaols of this country, we have had access to information which enables us to say with confidence that in this department of the administration extensive reforms are greatly needed, and may easily be made. The researches of that committee will, we hope, enable the Law-Commission hereafter to prepare such a Code of Prison-Discipline, as, without shocking the humane feelings of the community, may yet be a terror to the most hardened

wrong doers. Whenever such a Code shall come into operation, we conceive that it will be advisable greatly to shorten many of the terms of imprisonment which we have proposed.

It will be seen that we have given to the Government a power of commuting sentences in certain cases without the consent of the offender. Some of the rules which we have laid down on this subject will be universally allowed to be proper. It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code. It seems to us also very desirable that the Government should have the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances of which the executive authorities ought to be accurately informed, but which must often be unknown to the ablest judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect. The state of those remote Provinces of the Empire in which convict settlements are established, and the way in which the interest of those Provinces may be affected by any addition to the convict population, are matters which lie altogether out of the cognizance of the tribunals by which those sentences are passed, and which the Government only is competent to decide.

The provisions contained in Clauses 43 and 44 are more likely to cause difference of opinion. We are satisfied that both humanity and policy require that those provisions, or provisions very similar to them, should be adopted.

The physical differenee which exists between the European and the native of India renders it impossible to subject them to the same system of prison-discipline. It is most desirable, indeed, that in the treatment of offenders convicted of the same crime and sentenced to the same punishment there should be no apparent inequality. But it is still more desirable t' at there should be no real inequality, and there must be real inequality unless there be apparent inequality. It would be cruel to subject an European for a long period to a severe prison-discipline, in a country in which existence is almost constant misery to an European who has not many indulgences at his command. If not cruel it would be impolitic. It is unnecessary to point out to his Lordship in Council how desirable it is that our national character should stand high in

the estimation of the inhabitants of India, and how much that character would be lowered by the frequent exhibition of Englishmen of the worst description, placed in the most degrading situations stigmatized by the Courts of Justice, and engaged in the ignominious labor of a gaol.

As there are strong reasons for not punishing Europeans with imprisonment of the same description with which we propose to punish natives, so there are reasons equally strong for not suffering Europeans who have been convicted of serious crimes to remain in this country. As we are satisfied that nothing can add more strength to the Government, or can be more beneficial to the people, than the free admission of honest, industrious, and intelligent Englishmen, so we are satisfied that no greater calamity could befall either the Government or the people, than the influx of Englishmen of lawless habits and blasted character. Such men are of the same race and color with the rulers of the country, they speak the same language, they wear the same garb. In all these things they differ from the great body of the population. It is natural and inevitable that in the minds of a people accustomed to be governed by Englishmen, the idea of an Englishman should be associated with the idea of government. Every Englishman participates in the power of Government though he holds no office. His vices reflect disgrace on the Government though the Government gives him no countenance.

It was probably on these grounds that Parliament, at the same time at which it threw open a large part of India to British-born subjects of the King, directed the local legislature to provide against those dangers which might be expected from an influx of such settlers. No regulation can, in our opinion, promote more effectually, or in a more unexceptionable manner, the end which Parliament had in view, than that which we now propose.

We recommend that whenever a person not both of Asiatic birth and of Asiatic blood commits an offence so serious that he is sentenced to two years of simple imprisonment, or to one year of rigorous imprisonment, it shall be competent to the Government to commute that punishment for banishment from the Territories of the East India Company.

(To be continued.)

EXAMINATIONS FOR THE CIVIL SERVICE OF INDIA.

Regulations for the Open Competition of July, 1878.

N. B.—The Regulations are liable to be altered in future years.

1. On June 25th, 1878, and following days, an Examination of Candidates will be held in London. At this Examination, not fewer than Candidates will be selected, if so many shall be found duly qualified. Of these, will be selected for the presidency of Bengal, [for the Upper Provinces and for the Lower Provinces,] for that of Madras, and for that of Bombay.*—Notice will hereafter be given of the days and place of Examination.

2. Any person desirous of competing at this Examination must produce to the Civil Service Commissioners, before the 1st of May, 1878, evidence showing:—

(*a*) That he is a natural-born subject of Her Majesty.

(*b*) That his age on the 1st of January, 1878, will be above seventeen years and under nineteen years. [N. B.—In the case of Natives of India this must be certified by the Government of India, or of the Presidency or Province in which the Candidate may have resided.]

(*c*) That he has no disease, constitutional affection, or bodily infirmity unfitting him, or likely to unfit him, for the Civil Service of India.†

(*d*) That he is of good moral character.†

He must also pay such fee as the Secretary of State for India may prescribe.‡

3. Should the evidence upon the above points be *primâ facie* satisfactory to the Civil Service Commissioners, the Candidate will, upon payment of the prescribed fee, be admitted to the Examination. The Commissioners may, however, in their discretion, at any time prior to the grant of the Certificate of Qualification hereinafter

---

* The number of appointments to be made, and the number in each Presidency, &c., will be announced hereafter. It will probably be about half the usual number.

† Evidence of health and character must bear date not earlier than the 1st April, 1878.

‡ The fee for this Examination will be £5, payable by means of a special stamp according to instructions which will be communicated to Candidates.

referred to, institute such further inquiries as they may deem necessary; and if the result of such inquiries, in the case of any Candidate, should be unsatisfactory to them in any of the above respects, he will be ineligible for admission to the Civil Service of India: and if already selected, will be removed from the position of a Probationer.

* 4. The Examination will take place only in the following branches of knowledge:—

	Marks.
§ English Composition	300
** History of England—including a period selected by the Candidate	300
** English Literature—including books selected by the Candidate	300
Greek	600
Latin	800
French	500
German	500
Italian	400
§ Mathematics (pure and mixed)	1000
†† Natural Science: that is, the Elements of any two of the following Sciences, viz.:—	

Chemistry, 500; Electricity and Magnetism, 300; Experimental Laws of Heat and Light, 300; Mechanical Philosophy, with outlines of Astronomy, 300.

Logic	300
Elements of Political Economy	300
‡‡ Sanskrit	500
‡‡ Arabic	500

§ Marks assigned in English Composition and Mathematics will be subject to no deduction.

** A considerable portion of the marks for English History and Literature will be allotted to the work specially prepared. In awarding marks for this regard will be had partly to the extent and importance of the periods or books selected, and partly to the thoroughness with which they have been studied.

†† The Examination will range from Arithmetic, Algebra, and Elementary Geometry, up to the elements of the differential and integral calculus, including the lower portions of applied Mathematics.

‡‡ The standard of marking in Sanskrit and Arabic will be determined with reference to a high degree of proficiency, such as may be expected to be reached by a Native of good education.

Candidates are at liberty to name, before May 1st, 1878, any or all of these branches of knowledge. No subjects are obligatory.

5. The merit of the persons examined will be estimated by marks; and the number set opposite to each branch in the preceding regulation denotes the greatest number of marks that can be obtained in respect of it.

6. The marks assigned to Candidates in each branch will be subject to such deduction as the Civil Service Commissioners may deem necessary, in order to secure that a "Candidate be allowed no credit at all for taking up a subject in which he is a mere smatterer."

7. The Examination will be conducted by means of printed questions and written answers, and by *vivâ voce* Examination, as may be deemed necessary.

8. The marks obtained by each Candidate, in respect of each of the subjects in which he shall have been examined, will be added up, and the names of the Candidates who shall have obtained a greater aggregate number of marks than any of the remaining Candidates, will be set forth in order of merit, and such Candidates shall be deemed to be selected Candidates for the Civil Service of India, provided they appear to be in other respects duly qualified. Should any of the selected Candidates become disqualified, the Secretary of State for India will determine whether the vacancy thus created shall be filled up or not. In the former case, the Candidate next in order of merit, and in other respects duly qualified, shall be deemed to be a selected Candidate. A selected Candidate declining to accept the appointment which may be offered to him will be disqualified for any subsequent competition.

9. Selected candidates, before proceeding to India, will be on probation for two years, during which time they will be examined periodically, with a view of testing their progress in the following subjects:—*

* Full instructions as to the course of study to be pursued will be issued to the successful candidates as soon as possible after the result of the open competition is declared.

		Marks.
1.	Law	1,250
2.	Classical Languages of India—	
	Sanskrit	500
	Arabic	400
	Persian	400
3.	Vernacular Languages of India (each) ...	400
4.	The History and Geography of India ...	350
5.	Political Economy	350

In these Examinations, as in the open competition, the merit of the candidates examined will be estimated by marks, and the number set opposite to each subject denotes the greatest number of marks that can be obtained in respect of it at any one Examination. The Examination will be conducted by means of printed questions and written answers, and by *vivâ voce* Examination, as may be deemed necessary. The last of these Examinations will be held at the close of the second year of probation, and will be called the "Final Examination," at which it will be decided whether a selected candidate is qualified for the Civil Service of India. At this Examination candidates will be permitted to take up any one of the following branches of Natural Science, *viz.*—Botany, Geology, and Zoology, for which 350 marks will be allowed.

10. Any Candidate who, at any of the periodical Examinations, shall appear to have wilfully neglected his studies, or to be physically incapacitated for pursuing the prescribed course of training, will be liable to have his name removed from the list of selected Candi dates.

11. The selected Candidates who, at the Final Examination, shall be found to have a competent knowledge of the subjects specified in Regulation 9, and who shall have satisfied the Civil Service Commissioners of their eligibility in respect of age, health, and character, shall be certified by the said Commissioners to be entitled to be appointed to the Civil Service of India, provided they shall comply with the regulations in force, at the time, for that Service.

12. Applications from persons desirous to be admitted as Candidates are to be addressed to the "Secretary to the Civil Service Commissioners, London, S..W.," from whom the proper form for the purpose may be obtained.

September, 1877.

The Civil Service Commissioners are authorized by the secretary of State for India in Council to make the following announcements :—

(1.) Selected Candidates will be permitted to choose,* according to the order in which they stand in the list resulting from the open competition as long as a choice remains, the Presidency (and in Bengal the Division of the Presidency) to which they shall be appointed, but this choice will be subject to a different arrangement, should the Secretary of State, or Government of India, deem it necessary.

(2.) The Probationers, having passed the necessary Examinations, will be required to report themselves to their Government in India not later than the close of December, 1881.

(3.) The seniority in the Civil Service of India of the selected Candidates shall be determined according to the Order in which they stand on the list resulting from the Final Examination.

(4.) An allowance of £150 a year will be given during each of the two years of their probation to all Candidates who pass their probation at some University to be approved beforehand by the Secretary of State, provided such Candidates shall have passed the required Examinations to the satisfaction of the Civil Service Commissioners, and shall have complied with such rules as may be laid down for the guidance of selected Candidates,

(5.) All selected Candidates will be required, after having passed the second periodical Examination, to attend at the India office for the purpose of entering into an agreement binding themselves, amongst other things, to refund in certain cases the amount of their allowance in the event of their failing to proceed to India. A surety will be required.

(6.) After passing the Final Examination, each Candidate will be required to attend again at the India Office, with the view of entering into covenants. The stamps payable on these documents amount to £1.

(7.) Candidates rejected at the Final Examination of 1880 will in no case be allowed to present themselves for re-examination.

* This choice must be exercised immediately after the result of the open competition is announced, on such day as may be fixed by the Civil Service Commissioners.

CALCUTTA HIGH COURT.

The 23rd July and 12th September, 1877.

Full Bench.

PRESENT:

The Hon'ble Sir R. Garth, Kt., Chief Justice, and the Hon'ble Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

KALI CHURN DUTT and others (Plaintiffs), *Appellants,*

versus

JOGESH CHUNDER DUTT, (Defendants), *Respondent.*

Suit for recovering money paid under decrees subsequently reversed or superseded or modified.

A suit for enhancement of rent having been decreed, the defendant appealed, but, pending the appeal, he paid the decretal amount, as well as the amount of subsequent decrees passed against him on the force of the first decree. In appeal, the suit for enhancement having been dismissed, the defendant (the present plaintiff) brought a suit for recovering the difference between the fixed rent and the enhanced rent which he had paid under the above circumstances.

Held by Macpherson, J., Ainslie, and Markby, J. J., (Garth, C. J., and Jackson, J. dissentient) that the plaintiff is in equity and good conscience entitled to have the whole of the rent which he paid at the enhanced rate refunded to him. The original decree (which was the sole basis of all the decrees made, pending the appeal) having been reversed, all the subsequent decrees were superseded, as they were mere subordinate and dependent decrees, and they cannot be held to have remained in force, so far as the enhanced rate of rent was concerned, when the decree on which they were dependent has been reversed.

Mr. R. E. Twidale for the Appellants.

The Standing Counsel, Mr. J. D. Bell, for the Respondent.

This was a case referred to a Full Bench by the Chief Justice and Mr. Justice McDonell, and the order of reference was as follows:—

This was a suit to recover certain sums by way of enhanced rent, which the plaintiff has been compelled to pay to the present defendant under certain decrees hereinafter mentioned.

The facts are these—

The plaintiff claimed to hold certain property under the defendant, at a permanent fixed rent of Rs. 461.

The defendant brought a suit against him to enhance that rent, and one of the grounds of defence was that the rent was not legally capable of enhancement.

The Court of first instance gave the plaintiff a decree for an enhanced rent of Rs. 2,417, and the High Court, on appeal, affirmed that decree.

On appeal to the Privy Council, their Lordships, on the 25th day of March, 1873, reversed the judgments of both Courts, and held that the old rent could not legally be enhanced.

Meanwhile, between the date of the first decree for the enhanced rent, and the judgment of the Privy Council reversing that decree, the present defendant brought several suits for the enhanced rent against the plaintiffs, and obtained judgment for various sums, amounting to Rs. 8,561, which sums were duly paid by the present plaintiffs.

No application was made by the present plaintiffs for a review of those judgments; but on the 25th of November 1875, this suit was brought by the then plaintiffs to recover from the defendant the sum of Rs. 8,561, being the difference between the amount of enhanced rent recovered under those judgments, and the amount of the fixed rent which the plaintiffs were bound to pay.

The Courts below have given the plaintiffs a decree for this difference.

From this decree the defendant has appealed; and he contends that, according to the well-known rule of law laid down in Marriott *versus* Hampton, 2 Smith's Leading Cases (sixth edition), page 375, money paid under the judgment of a competent Court cannot be recovered back so long as that judgment remains unreversed.

The plaintiffs, on the other hand, contend that the case of Shama Persad and others *versus* Hurro Persad and others, 10 Moore's Indian Appeals, page 203, is an authority in his favour, and that the judgment for enhanced rent obtained after the first suit for enhancement was decreed, must be considered as superseded by the judgment of the Privy Council reversing that decree.

The case of Raja Nilmoni Singh, Deo Bahadoor *versus* Saroda Persad Mukerji, decided by Justices Kemp and Pontifex on 31st December 1872, and reported in the Law Observer of 1872-73, page 76, seems to favour this view; whereas the case of Murari Mohajun *versus* Mahomed Akmal, 22 Weekly Reporter, page 161, decided by Justices Kemp and Birch, seems opposed to it. See also decisions of Phear and Morris, J. J.—22 W. R., p. 213.

The point being an important one, and the decisions upon it being apparently conflicting, we think it right to refer this question to a Full Bench :—

Whether the plaintiff is entitled to recover in this suit the difference between the fixed rent and the enhanced rent which he has paid to the defendant under the above circumstances.

The judgment of the Court was as follows :—

Ainslie, J.—It is obvious that the defendant has received from the plaintiff, under successive decrees, made during the long period that elapsed between the decree for enhancement and the reversal of that decree by the order of Her Majesty in Council, sums of money for enhanced rent to which the final order in the enhancement suit shows that he is not entitled.

The plaintiff, as tenant, persistently refused to acknowledge his liability and compelled his landlord to recover the rent by suit, in order, as I understand it, to have a formal record that he paid only under compulsion.

The Courts were bound to follow the existing judgment by which the liability of the plaintiff to pay enhanced rents had been declared. They had no option in the matter at the time.

Under such circumstances, I cannot conceive that it was their intention to declare finally that the defendant was entitled to the enhanced rent for the periods covered by the several suits, irrespective of the result of the appeal to Her Majesty in Council, which was delayed for some fourteen years.

The order of Her Majesty in Council was such that, if it had been known at the time of making the decrees, they must of necessity have gone the contrary way, so far as the enhanced portion of the rent claimed was concerned ; and therefore, it seems to me that it did at once supersede the decrees based upon the reversed order of the High Court.

There appears to me to be a wide distinction between the re-opening of decrees based upon, and, necessarily controlled by, a previous decree, subsequently reversed in appeal, and the re-opening of decrees which the Court making them might have varied, had it not thought fit to follow a decree afterwards set aside.

Looking at the case of Doorga Persad *vs.* Tara Persad, I am of opinion that there is authority for saying that the former class of decrees is, *ipso facto*, superseded so soon as the controlling

decree is nullified; and that what may have been done under them, is not final, but may be undone. The mode of proceeding for this purpose is not a question of serious importance. I agree in the judgment of Mr. Justice Macpherson.

Macpherson, J.—In my opinion, the principle on which the Privy Council acted in the case of Shama Persad Roy Chowdhry (10 Moore's Indian Appeals, 3 W. R., p. 111) is applicable, and the plaintiff is entitled to recover the difference between the rent for which he was really liable, and the enhanced rent which he paid, pending his appeal against the decree by which the rent was enhanced.

That decree (although in a suit instituted in 1859, before Act X came in force) was made by the Principal Sudder Ameen, on the 29th of June; and the 1863 appeals to the Judge of the District and to this Court were decided on the 18th June 1864, and the 6th February 1865, respectively. An appeal to the Privy Council was filed here on the 20th of July 1865, and was finally disposed of by the decree of the Privy Council of the 5th of May 1873, which reversed the decisions of the Courts in this country, and found that the tenure was not liable to enhancement.

Pending these proceedings, the zemindar instituted no less than sixteen different suits for rent at the enhanced rate. Of these suits, twelve were brought under Act X. of 1859, and four under Act VIII. of 1869 B. C. In the first two of these suits, a portion of the claim was for rent at the old rate, for a period antecedent to the original decree for enhancement.

I assume that the plaintiff is in equity and good conscience entitled to have the whole of the rent which he paid at the enhanced rate refunded to him. All these decrees for the enhanced rent were based solely upon the decree for enhancement, which the Privy Council reversed in May 1873; and the only question to be decided now is, whether the plaintiff (if he has any remedy at all) is technically wrong in the remedy which he seeks.

The contention is that, as these subsequent decrees for rent at the enhanced rate are still unreversed, a suit will not lie to cover the money paid under them. It is suggested that, though our Courts had decided that the rent could be enhanced, the defendant ought not to have submitted to these later decrees, but should have contested each case, and appealed, if necessary, to the Privy Council in

each. And it is also said that he should apply, or should, on the Privy Council making its order in May 1873, have applied, for a review of judgment in each of the sixteen cases, and, having got the judgments reviewed and reversed, should obtain restitution in each suit.

In thirteen, out of the sixteen, suits, the decree was for a sum under Rs. 1,000, and in seven of them it was far less than Rs. 500; and I should hesitate before declaring that, in the circumstances in which the plaintiff was placed, he was bound to appeal in all these suits, and incur the enormous expense necessarily involved in such a course—an expense far exceeding the amount in dispute.

As to applying for a review in each case, it is exceedingly doubtful, to say the least of it, how far a review could be obtained, or could at any time have been obtained, in the cases under Act X. of 1859, even supposing it obtainable in the four cases under Act VIII. of 1869 B. C. But, if it be granted that a review might have been obtained in each of the sixteen suits that mode of proceeding would have been, on the whole, much more cumbrous and inconvenient than the single suit which the plaintiff has instituted, embracing his whole claim.

Of course, these questions of convenience and the like, could not be taken into consideration at all, if there were any fixed rule prohibiting this suit from being brought. It seems to me, however, that not only is there no such fixed rule, but that the Privy Council has expressly decided (in Shama Persad Roy's case) that a suit such as this may properly be entertained by the Court.

In their judgment it is said :—"There is no doubt that, according to the law of England—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree, or judgment, cannot be recovered back in a fresh suit, or action, whilst the decree, or judgment, under which it was recovered remains in force. But this rule of law rests, as their Lorldships apprehend, upon this ground, that the original decree, or judgment, must be taken to be subsisting and valid, until it has been reversed, or superseded, by some ulterior proceeding. If it has been so reversed, or superseded, the money recovered under it ought certainly to be refunded; and, as their Lordships conceive, is recoverable either by summary process, or by a new suit or action. The true question, therefore, in such cases, is whether the decree, or judgment, under

which the money was originally recovered, has been reversed or superseded." Applying that rule to the case before us, I think that the original decree (which was the sole basis of all the decrees made, pending the appeal) having been reversed by the Privy Council, all the subsequent decrees were superseded by the Privy Council's order. It was plainly intended by the Privy Council's order, which decided that the rent of this tenure could not be enhanced, that the plaintiff should not pay rent at any rate higher than that for which the tenure was declared to be liable; and it is practically a contravention of the order to permit the decrees obtained by the zemindar, pending the appeal, to interfere with that intention. The subsequent decrees were mere subordinate and dependent decrees, and they cannot, under the circumstances of this case, be held to have remained in force, so far as the enhanced rate of rent was concerned, when the decree on which they were dependent has been reversed. I am aware that in Shama Persad Roy's case, the order made by the Privy Council turned in some degree on the peculiar terms of their original order. But, giving full weight to that fact, it seems to me clear that their Lordships admit the principle that the main decree being reversed, which was the basis of the subsequent decrees, these latter, being subordinate and dependent decrees, were superseded. It cannot be disputed that, although the later and subordinate decrees remained unreversed, the Privy Council held that a separate suit lay to recover what had been wrongly paid under those decrees. And this was evidently the view taken of the effect of Shama Persad Roy's case by *Kemp* and *Pontifex, J. J.*, in the case of Raja Nilmoni Singh *vs.* Saroda Persad Mookerji (decided on the 2nd September 1872, and reported in the Law Observer for that year, page 76.)

The question of Limitation is not raised in the order of reference. But I incline to agree with the Subordinate Judge (and substantially for the reasons given by him) in thinking that the suit is not barred.

The circumstances of this case are peculiar, and it is impossible, in dealing with it, to lay down any rule of very general application. The plaintiff has practically no remedy, unless this suit will lie.

Markby, J.—I concur in this judgment.

Garth, C. J.—I am of opinion that the decree made by the Privy Council in the case of Ram Churn Dutt *vs.* Romesh Chunder Dutt

did not supersede, or modify, the several decrees which had been previously obtained for enhanced rent by the present defendants; and consequently, that the plaintiffs in this case are not entitled to recover.

The plaintiffs base their claim entirely upon the authority of the case of Shama Persad *vs.* Tara Persad (30 M. I. Appeal, 203), contending that the principle upon which that case proceeded, applies to the present, and that the decrees for enhanced rent obtained by the prsent defendant since the year 1864 have been partially superseded, or modified, by the decree of the Privy Council in the above case of Ram Chunder Dutt *vs.* Romesh Chunder Dutt.

We are bound, of course, to accept the decision in Shama Persad *vs.* Tara Persad as binding upon this Court, so far as it goes; but, if the principle of it is to be extended, as the plaintiffs contend it ought to be, it will lead, in my opinion, to very inconvenient consequences, and to a direct departure from a rule of law which has been established for years, and has always been acted upon in England and in this country.

Now, in order to see how far the authority of the case of Shama Persad *vs.* Tara Persad is applicable to the present, it is necessary to ascertain, in the first place, what the grounds of that decision really were.

The case was a very peculiar one.

In the year 1821, Doorga Persad, claiming to be heir to his uncle, brought a suit against Shama Persad, a debtor to his uncle's estate, for Rs. 23,024, the principal and interest due upon a bond.

Pending this suit, Tara Persad sued Doorga Persad for one-half of the uncle's property, and in 1829 a compromise was effected of that suit, under which Tara Persad became entitled to a six-anna share of the debt due from Shama Persad.

Subsequent to this, Doorga Persad obtained a decree against Shama Persad for the principal and interest due upon the bond. From this decree Shama Persad appealed to the Sudder Court, and pending that appeal, in 1831, there was a compromise of that suit also, under which Shama Persad was to pay Rs. 27,127 at the end of three years, without interest, in default of which payment Doorga Persad was to be at liberty to realize the amount. This compromise was made without Tara Persad's knowledge; and Shama

Persad did not pay the stipulated amount at the end of the three years.

In this state of things, Tara Persad, in March 1835, brought another suit against Doorga Persad, claiming a six-anna share of the bond debt and interest due up to the commencement of Doorga Persad's first suit in 1821; and in his plaint he reserved to himself the right of bringing another suit for his share of the interest upon the bond debt from 1821 to the 27th July 1829, on which day Doorga Persad obtained his decree against Shama Persad.

This suit was carried through the Courts of this country up to the Sudder Dewanny Adawlut, where, eventually, a decree was made against Doorga Persad for the entire amount of principal and interest sued for.

From this decree Doorga Persad appealed to the Privy Council, who decreed, in 1849, that the decree of the Sudder Court ought to be reversed, and that Doorga Persad was not liable to Tara Persad for the whole amount of his six-anna share and interest of the debt. Their Lordships held that *Doorga Persad ought to be considered as a trustee for Tara Persad, and was only responsible for so much of the debt as he had actually received, or without his wilful default might have recovered.* And an order was made accordingly by their Lordships that the decree of the Sudder Dewanny Adawlut should be reversed; that Doorga Persad should be declared liable to Tara Persad for a six-anna share of what he had received, or might thereafter receive, or what he might have received but for his wilful defaults, for and in respect of the sum of Rs. 24,217-12 and the interest thereon; *and the case was referred back to the Sudder Dewanny Adawlut to ascertain, carry out, and enforce the rights and liabilities of the parties as above declared.*

From the 11th of March 1835, when the above suit was commenced, to the 5th of July 1849, when the judgment of the Privy Council was pronounced, upwards of fourteen years had elapsed; and during that interval, in the year 1842, an action was brought in this country by Tara Persad against Doorga Persad to recover Rs. 4,593-12-9, being the amount of interest on the six-anna share of the bond debt, for which, in his previous proceedings, he had reserved his right to sue; and in this action he obtained a decree for the Rs. 4,593-12-9, with interest at 12 per cent., amounting to

Rs. 11,127-15-3, which he accordingly paid thus—Rs. 8,200-7-3 on the 28th of April 1848, and Rs. 2,927-8 on the 4th August 1857.

Several attempts were made by Doorga Persad to have this decree for interest dealt with and adjusted by the Sudder Dewanny Adawlut as part of the entire subject matter of the first suit, upon which the Privy Council had passed their judgment; but, failing these attempts, he brought a suit against Tara Persad to recover back the Rs. 11,127-15-3, which he had been unjustly compelled to pay.

The suit was decided against him by the Courts of this country, and was taken on appeal to the Privy Council, where the judgment was given which has been the subject of so much discussion, and which is insisted upon here by the plaintiff as a conclusive precedent in his favour.

Their Lordships in that case distinctly affirmed the well-known principle of law, that in this country, as in England, money recovered under a decree, or judgment, cannot be recovered back in a fresh suit so long as the decree, or judgment, under which it was recovered, remains in force. They go on to say that this rule of law rests upon the ground that the decree, or judgment, must be considered as subsisting, until it has been reversed, or superseded by some ulterior proceeding. But when it has been so reversed, or superseded, the money paid under it may be recovered back.

Their Lordships then go on to say that the decrees in this country under which the sum of Rs. 11,127-15-3 was recovered, were in fact superseded by the order of Her Majesty in Council in 1849. That order, they considered, extended not only to the claim of the plaintiff in the particular suit in which it was made, but to the adjustment of the rights and interests of the parties in the entire subject matter of that suit. The order had declared Doorga Persad to be a trustee for Tara Persad of the whole six-anna share of the bond and interest; and it had directed the Sudder Dewanny Adawlut to *adjust* and *enforce* the rights and liabilities of the parties in accordance with the directions of the Privy Council. If this order had been obeyed by the Sudder Dewanny Adawlut, as their Lordships say it ought to have been, the interest in question, Rs. 11,127-15-3, would have been refunded to Doorga Persad by the order of the Sudder Dewanny Adawlut, under and by force of their Lordships' previous decree; because that *decree* had *superseded* and

annulled what their Lordships call the "*dependent and subordinate decrees*" which had been obtained for the interest.

But, as the Sudder Dewany Adawlut failed to take any steps to carry out the directions of the Privy Council, their Lordships considered that the Rs. 11,127 were recoverable by a fresh suit; and they accordingly reversed the decree of the Sudder Court, and adjudged to the plaintiff that amount, with interest at 12 per cent.

Now, two things appear to me clear from this judgment:

1*stly.*—That the Privy Council had no intention of questioning the authority of the rule laid down in Marriott *vs.* Hampton. On the contrary, they distinctly affirm it, because they say that, as long as the decree, or judgment, under which money has been obtained, remains in force, no money paid under it can be recovered back; and 2*ndly.*—That their Lordship's judgment is based entirely upon this principle, *viz.*, that the effect of the order of Her Majesty in Council made in 1849 was not only to reverse the judgment in the case which was then *subjudice,* but also to supersede and annul, *ipso facto,* the decrees which had been made in another suit.

I have searched in vain to find any other instance in which the decree of an Appellate Court, in one suit has been held to have the legal effect of annulling or altering, *ipso facto,* a decree made by a Subordinate Court in another suit; but, of course, we are bound here to treat the decision of the Privy Council as binding upon us, as far as it goes, and to deduce as carefully as we can from the language of the judgment what was the ground upon which their Lordships considered that the order made in the first suit in 1849 had the effect of superseding the decree for the Rs. 11,127 interest.

It appears to me that the only explanation of the apparent difficulty is this, that, in the decree of 1849, their Lordships assumed to deal, and were in fact dealing not only with the actual claim made in the suit, but with the status and rights of the parties with reference to the whole subject matter of it. They declared that Doorga Pershad was a Trustee of Tara Persad upon certain terms and conditions; and they directed the Court here to adjust the rights and liabilities of the parties in accordance with that declaration; and, as the interest of the bond (Rs. 11,127)

formed part of the fund in respect of which that trust had been declared, their Lordships considered that, although a decree had been obtained in the Courts here for the interest, that decree was as much dealt with and superseded by their judgment as the decree which had been made with reference to the remainder of the bond debt.

Upon this ground, and upon this ground only, it appears to me. their Lordships' judgment proceeded; and I do not understand that they intended to overrule the principle laid down in Marriott *vs.* Hampton, or to prescribe a different rule of equity in this country from that which obtians in England.

It does not appear to me that their decision can be considered as governing the present case, unless we can find that the decree made by their Lordships on the 25th of March 1873, reversing the first judgment for the enhanced rent, had the legal effect, *per se*, of superseding, or modifying, the subsequent decrees for enhanced rent, obtained between the year 1864 and the 25th of November 1875.

Now, on looking at the language of their Lordships in that decree, I cannot discover that they dealt, or intended to deal, with anything else than the actual subject matter of the suit upon which they were engaged.

Their judgment involves no change in the mutual relation of the parties. Their Lordships give no directions to the Courts of this country as to adjusting the parties' rights or liabilities. They simply decide the question, whether or not the plaintiff was entitled to enhance the plaintiff's rent; so that, unless we are to hold that in every case the decree of an Appellate Court has the effect of superseding, or modifying, every other decree inconsistent with it, which may have been made between the same parties in any other suit brought in a subordinate Court upon the same subject matter, I do not see how we can consistently say that the decree of the Privy Council of the 25th March 1873 has superseded, or modified, the subsequent decrees for enhanced rent obtained by the present defendant.

It will be observed that, in the case of Doorga Persad against Tara Persad, the decree which was superseded by the judgment of the Privy Council was for interest, which that judgment had declared not to be payable, and which their Lordships had in fact directed

the Sudder Dewany Adawlut to restore to Doorga Persad; so that the effect of Her Majesty's order, according to the view which their Lordships took of it, was to supersede the decree for interest altogether.

But here the case is very different. Their Lordships here have given no direction which could have the effect of superseding, or altering, any other decrees and it is not contended that these subsequent decrees are *absolutely superseded.* It is said that they are only modified, or in other words, that the Privy Council's judgment has had the effect, *per se,* of altering a judgment for one sum into a judgment for another sum.

But, if that is so, and if this principle is to be consistently carried out, the amounts of cost ought to be altered also.

This doctrine is certainly a novel one; and, if we are to apply it in all cases, as of course we must (if we are to act consistently), it will be attended with some strange consequences.

The rule, if it is to be applied in the case of one of the parties, must be applied also in the case of the other.

Thus, if in a suit like the present, a claim can be made by the tenant to recover sums which he has overpaid to the landlord, the landlord ought to have a corresponding remedy if the state of things were reversed.

Suppose that, in the original suit, the Courts here had decided that the landlord was not entitled to the enhanced rent, but the Privy Council overruled that judgment, and decided that he was so entitled; and suppose also that, pending the appeal to the Privy Council, the landlord had brought several suits for the enhanced rent, but, in each, had only recovered the original rent,—if the above principle is to be carried out, the landlord would be entitled, in a fresh suit, to recover the enhanced rent which he had failed to recover in his subsequent suits here, and to which the Privy Council had declared him entitled.

So, again, if the rule is to apply to cases of landlord and tenant it must apply to all other cases where the relative rights of parties are determined in one suit, and claims founded on those suits. (The case of Shama Persad *vs.* Tara Persad was not a case between landlord and tenant).

Thus, for instance, A. sues B. to recover the value of coal which he claims as having been taken out of his coal mine. The question

depends upon whether B. has a right to take the coal from a particular area; and A. obtains a decree for damages, upon the ground that B. has no such right. B. appeals to the High Court. Meanwhile B. continuing to take the coal, A. brings another suit against him for damages, and recovers. The High Court reverses the original decree. B. may then sue for the damages which he has paid in the second action, as money had and received to his use.

But, if this is to be law, the converse proposition ought to hold good also; that is to say, suppose the decree in the first suit to be in favour of B. on the ground that B. had a right to get the coal, and A. brought another suit against B. and failed upon the same ground, the Court of Appeal reverses the first decree—surely A. ought to be entitled to recover by a fresh suit the value of the coal which was denied him in the second action.

It would be a palpable injustice to allow one party to avail himself of the judgment of the Appellate Court, and not the other.

In the case above-mentioned, the question as to the sum to be recovered would be tolerably simple. But, suppose, a case of this kind. A. sues B. for damages for buliding a house upon two pieces of land which he claims—Blackacre and Whiteacre. The question is whether B. has any right to do this. The Court decides that he has not, and awards damages to A. B. appeals. Meanwhile, the building still going on A. brings a fresh suit for damages, which he has a right to do for the continuing trespass, and recovers further damages. The Court of Appeal reverses the first judgment in part, upon the ground that B. had a right to build on Blackacre, but not on Whiteacre; and reduces the damages accordingly. Can B. sue to recover *part of the damages* incurred in the second action? And, if so, what part? And how is the amount to be ascertained? In other words, to what extent, if at all, has the judgment of the Appellate Court *superseded*, or *altered*, the decree of the subordinate Court?

Then, again, it must be borne in mind that, if a decree of one Appellate Court is to have the effect of reversing, or altering, decrees in other suits, the same effect must be given to a decree of any other Appellate Court under similar circumstances. The decree of the Privy Council, as an Appellate Court, cannot have a different effect from that of the High Court, or the District Court, or the Court of the Subordinate Judge in its appellate capacity.

Thus, suppose that, in a suit by a landlord against a tenant for enhanced rent, the Moonsiff gives the plaintiff a decree. The case is appealed to the Subordinate Judge, who reverses the Moonsiff's judgment. Meanwhile, a second decree has been obtained before the Moonsiff for the enhanced rent, and the tenant has paid the amount.

The tenant under these circumstances would be entitled, by force of the judgment of the Subordinate Judge, to recover from the landlord the amount which he has overpaid under the second decree.

But the landlord then takes the Subordinate Judge's judgment upon special appeal to the High Court; and the High Court reverses that judgment, and affirms the Moonsff's.

The consequence would be that the landlord would be entitled to recover in a third suit the sum which he had previously recovered from the tenant on the second suit.

If this state of the law is to prevail in this country, it is difficult to see where litigation is to stop; or when people's rights are ever to be considered as finally determined.

If, in cases like the present, it is right that the English rule should be departed from at all, it appears to me that a review of judgment would be not only the most complete, but the most appropriate and unobjectionable, remedy; but this point we are not asked to decide by the present reference.

The only question before us is whether the present suit will lie, and I am strongly of opinion that it will not. I consider that it does not come within the principle of the case of Shama Persad *vs.* Tara Persad, decided by the Privy Council; and I cannot help deeply regretting the conclusion at which the majority of my learned brothers have arrived.

It is a conclusion directly opposed to what I consider a valuable and well-established rule of law; and I believe that it will be attended with most inconvenient and mischievous consequences.

The case will be sent back to the Division Bench for final disposal, and, speaking only for myself, I trust that the very serious question involved in the case may be taken up in appeal to the Privy Council.

Jackson, J.—I concur in this judgment.

DIFFERENT KINDS OF MORTGAGES.

[*In continuation of page 260.*]

General Hypothecation—Rights of Mortgagee.*

To go back. Every species of property, whether moveable or immoveable, which can be alienated, may be also the subject of mortgage, but it seems that a general hypothecation will not be recognised as valid by our Courts. (N. W. P., Vol. VII, p. 265 ; S. D. A., 1855, p. 353 ; compare 2 All., 263). The question, however, is not now of much practical importance, as no document which does not sufficiently specify the property comprised in it, can be registered, and a general hypothecation, therefore, cannot be created by registered instrument.

As regards the power to mortgage, it may be said that, generally speaking, a mortgage being a qualified alienation, the same rules which regulate the power to sell also regulate the capacity to mortgage. A detailed examination of these rules, which you will find in Mr. Justice Macpherson's treatise on Mortgages, would carry me much beyond the range of the present lectures. A doubt may, however, sometimes arise when trustees are empowered to sell, and no express power to mortgage is given. The law on the subject in England is that a trustee empowered to sell has presumably the right to mortgage, except when there is clear indication in the language of the instrument that no such authority was intended to be given. The question does not seem to have been ever distinctly raised in this country; but there can be no doubt that if it should arise the point will be decided in the same way.

I shall now proceed to discuss the rights of the mortgagee, when the property pledged to him has received any accession, or undergone any alteration. The general law on the subject is that the creditor has not only a right against the property mortgaged to him, but also to any augmentation or increase. Thus, if a flock of sheep be mortgaged, the creditor acquires the same rights to any natural increase, as he has against the animals which composed the flock at the time of the mortgage. On the same principle, accessions to the mortgaged property by alluvion become subject to the mortgage. In some systems of law, the right of the mortgagee to whom land has been pledged extends to any buildings which may be subse-

* *Vide* Tagore Law Lectures 1875-76, Lecture III by R. B. Ghose, pages 87 to 97.

quently erected by the debtor on the land. The right has not, however, so far as I am aware, been carried to a similar extent in India.

The right of the mortgagee will, however, not extend to anything which was never pledged to him, although it may be substituted in the place of the property originally pledged. Thus, to take a familiar instance from the Roman law, if a farm together with the slaves upon it be pledged, and the slaves die and are replaced by others, the right of the creditor shall not extend to the latter, except, as I have already said, where they are the issues of the deceased slaves.

This limitation of the right of the creditor however must not be confounded with cases in which the pledge is not actually destroyed, but to use the language of Sir James Colvile, only "assumes a new form."

A question of considerable nicety on this point arose in the case of *Byjnath Lall* v. *Ramdin Chowdhry*, which was heard in the last resort by the Lords of the Judicial Committee of the Privy Council. In the case before the Privy Council, which was heard on an appeal from a decree of the Calcutta High Court, the facts were somewhat peculiar. It seems that the mortgagor Gopalnarain Dass was, when he executed the deed of conditional sale, which was the foundation of the plaintiff's title, the undisputed owner of an eight-anna undivided share in an estate consisting of three Asli mouzas called Gunniporebija, Pemburinda and Tajpore Ruttompore, to each of which certain Dakhila villages were appurtenant. There was no partition or division among the shareholders, and the interest of the mortgagor therefore in the whole estate was an undivided moiety. In this state of things Gopalnarain executed the mortgage, out of which the suit arose, of the whole and entire eight-anna of the whole 16 annas of Mouzas Gunniporebija and Pemburinda, expressly excepting from the deed the eight annas of Tajpore Ruttompore. It should seem that before the execution of the mortgage, application had been made by some of the cosharers of the mortgagor for a partition of the estate under Regulation XIX of 1814. A partition was made by the Collector, and the result was that, instead of an undivided moiety of the whole estate, the whole of Mouza Pemburinda, the whole of Tajpore Ruttompore, and whole of another mouza, a dependency of the third Mouza, Gunniporebija, were allotted to Gopalnarain, to be held by him in severalty. Shortly after the partition, Gopalnarain's rights

and interests in the mouzas, which fell to his share, were sold at execution sales, and purchased by certain persons, who were the substantial defendants, and who resisted the right of the plaintiff the mortgagee, to take anything under his mortgage deed in excess of the eight-anna share of the mouzas which had been mortgaged to him, the mortgagee insisting upon his right to the whole sixteen annas of the mouzas which had fallen to the share of the mortgagor in lieu of the undivided moiety which was held by the mortgagor at the time of the execution of the mortgage. The Court of first instance gave judgment in favor of the plaintiff, proceeding upon the principle that the mortgagee was entitled to whatever was allotted to the mortgagor on the partition in lieu of his undivided eight-anna share in the Mouzas Gunniporebija and Pemburinda, which was the subject of the mortgage. On appeal, however, to the High Court, the right of the mortgagee was limited to the share which was expressly named in and covered by the mortgage deed, *i.e.*, ony to an eight-anna of Mouza Pemburinda and an eight-anna share of Mouza Gunniporebija. The case then went on appeal to the Privy Council, and the Judicial Committee affirmed the decree of the first Court, and declared that the principle laid down by the first Court was correct. In giving the judgment of the Privy Council, Sir James Colvile is reported to have observed :—" Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer (and for the sake of argument, the mortgage may be assumed to cover the whole of such undivided share), who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such cosharers ; but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed. In the present case there is not a suggestion of fraud, nor is there any ground to suppose that the partition was other than fair and equal. The mortgagee is content to accept what has been allotted in substitution of the undivided interest as the fair equivalent of it. Their Lordships are of opinion, not only that he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. There is,

therefore, no question here of election, or of the time when the election was made." (21 W. R., p. 237; compare N. W. P., Vol. VIII, p. 669; S. D. A., 1857, p. 359.)

I shall now proceed to consider the validity of a power of sale contained in a mofussil mortgage. The question appears to have been for the first time raised in the case of *Bhawani Churn Mitter* v. *Joykissen Mitter*, heard before the late Sudder Dewany Adawlut of Calcutta in the year 1842, when the Judges were unanimously of opinion that a sale by the mortgagee under the power did not pass a valid title to the purchaser.

The decision has been criticised by Mr. Justice Macpherson in his work on Mortgages (pp. 45—47), and there is no doubt that some of the reasons given by the learned Judges will not bear examination. But the judgment of the Court substantially rests upon the broad ground that it would be inexpedient to allow the mortgagee in this country to exercise the power. It is true that such a power has been found beneficial in England, but English mortgagors as a class are perfectly competent to take care of their own interests. In India, however, we have to deal with a very different order of men. The mass of mortgages in this country consist of mortgages of ancestral fields by ignorant ryots to a class of people not remarkable for their scrupulousness, and any one having experience of Indian litigation, must admit the danger of arming our money-lenders with the right to sell the properties pledged to them without the intervention of a Court of Justice. As observed by the Court in *Bhowani Churn Mitter* v. *Joykissen Mitter* :—" This Court has only to declare such a condition legal, and in the course of a short time not a mortgage bond would be without it. The mortgagee would then sell his debtor's propery to suit his own time, and in such manner and with such publicity and formalities as he thought proper. Fraud, it is to be feared, would frequently accompany the transfers, and the property fall into the hands of the mortgagee, or some of his connexions (even as in this case it is alleged the purchaser is the son-in-law of the mortgagee) at an inadequate price, leaving the lender at liberty still to pursue the borrower for the balance that may remain after the sale." (7 Select Reports, p. 429.)

With reference to the argument that the exercise of the power of sale was not unfair to the debtor, the learned Judges observe :—" It is urged for the plaintiff that the public sale of the mortgagor's property

cannot be a disadvantageous mode of proceeding towards the latter, that his property is sold to the highest bidder, and that if a surplus remains it belongs to himself. We have not to deal with abstract theories or bare possibilities, but with what experience and the principles of the Regulations furnish us, as our guides in the determination of a novel and unprecedented case. In a case of execution of a decree of Court, the proclamation of sale is an invitation to others interested to come and state their claims. If no claim is preferred, the title of the purchaser may generally be considered a pretty fair one. If claims are preferred, they are summarily investigated, and, should they appear fraudulent, are rejected; and in this case, too, the purchaser may generally be considered in a good position, as few are willing to incur the expense of a regular action on grounds already declared by a Court of Justice to be *prima facie* fraudulent. And yet, with all the formalities and securities of a transfer of real property by sale made by a Court of Justice, how frequent are the complaints that the property has been sold at an inadequate price, how much more frequent would they be, had not this Court held that inadequacy of price, at a regularly conducted sale, forms no ground for its reversal! If such be the case in such sales, the evils to be apprehended from permitting private individuals to sell their debtor's property, in satisfaction of their claims, must be ten-fold. But few purchasers at a fair price will be found, when in all probability, a lawsuit (as the order granting the review expresses it) will be tacked to the purchase. The object of the Regulation is to prevent improvident and injurious transfers of landed property at an inadequate price; the result of such a practice as that which the contract before us involves would be to render them universal." (7 Select Report, pages 440-41.)

It is true that the utmost latitude ought to be given to the parties to contract in any manner they please, but freedom of contract wears a very different aspect according as it is allowed to the English landowner or the Hindu ryot, and I am fortified in my view by the recommendation of the Indian Law Commissioners, who propose in their Sixth Report that a sale under a mortgage should in every case be conducted by the Court. (See also the observations of Melvill, J., in *Kesub Rao* v. *Bhowaneejee*, 8 Bom., p. 142.)

We have already seen that in most continental systems a sale without judicial process is absolutely void. Article 2078 of the

French Code says,—"The creditor connot in default of payment dispose of the pledge, saving to him the power of procuring an order of the Court that such pledge shall continue with him in payment, and up to its due amount according to an estimate made by competent persons, or that it shall be sold by auction."

"Every clause which shall authorise the creditor to appropriate the pledge to himself, or to dispose thereof without the abovementioned formalities, is void."

You will remember that the French Code, equally with the other systems of law on the Continent, is largely shaped by the Roman law, and if the power which the Roman pledgee possessed has not been retained in those systems, it may fairly be presumed that the exercise of the power is not suited to every condition of society. But for the peculiar economic conditions under which land is owned in England, it may indeed fairly be doubted whether the system would have worked well even in that country. Be that, however, as it may, there can be no doubt that it would be dangerous to trust the Indian money-lender with a power which is so much liable to abuse.

CALCUTTA HIGH COURT.

The 23rd July and 12th September 1877.

PRESENT:

The Hon'ble Sir Richard Garth, Kt., Chief Justice, and the Hon'ble Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

SUGNA AJHA, (Defendant,) *Appellant,*

versus

MUSSUMMAT LUNGESSUR KOER, (Plaintiff,) *Respondent.*

Special Appeal in Rent Suits—s. 102 of Act VIII (B.C.) of 1869.

Held by Garth, C. J., and Macpherson, Markby, and Ainslie, J. J., (Jackson, J., dissenting), that, under s. 102 of Act VIII (B. C.) of 1869, no Special Appeal lies where the suit is a suit for rent (not exceeding Rs. 100) in which no question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land, or to some interest in land, as between parties having conflicting claims thereto, has not been determined by the judgment.

This was a reference to a Full Bench by the 2nd Divisional Bench of the Court, and the points in issue are fully stated in the order of reference which was as follows:—

Mr. Justice Jackson.—This is an appeal against a judgment of the District Judge of Sarun made on appeal against an original judgment of the Moonsiff of Chumparun in a suit brought by the plaintiff for recovery of Rs. 52 and 9 annas, principal with interest, being arrears of rent.

The Judge having reversed the decision of the Moonsiff, the plaintiff comes before us, on special appeal, and objection is taken on behalf of the respondents that under the provisions of Section 102 of Act VIII of 1869 B. C. no second appeal to this Court will lie, the suit being a suit for rent in which no question "of right to enhance or vary the rent of a ryot or tenant or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has not been determined by the judgment."

This section will undoubtedly apply, and inasmuch as the judgment under consideration is one, which unless restricted by provision of law we should certainly reverse, it is impossible to avoid considering the question whether the special appeal is in fact taken away by the section referred to.

The pleader for the respondent having submitted his objection, has not thought fit to support it by any argument, and has left it to us to dispose of without any assistance from him.

This matter is not new, because unquestionably number of appeals to this Court have been dismissed on this ground, the division bench before which the appeals came having considered the section a valid bar to special appeal. As at present advised, I myself and my brother White are both of us inclined to think that the section does not take away the appeal to this Court.

But as the contrary opinion has been repeatedly acted upon by this Court, we are bound to refer the case to a Full Bench, and as the matter will be fully argued there, it is only necessary to state briefly the reasons which make us think that the appeal is not taken away by the section in question.

The authority of this Court to entertain special appeals, and the right of suitors to prefer such appeals, are provided for by Section 372 of the Civil Procedure Code, which proves that "a special appeal shall lie to the Sudder Court from all decisions passed in regular appeal by the Courts subordinate to the Sudder Court, on the ground of the decision being contrary to some law or usage having

the force of law, or of a substantial error or defect in law in the procedure or investigation of the case which may have produced errors or defect in the decisions of the case upon the merits."

The Court which heard the regular appeal in the case now before us, is the Court of the District Judge, which is unquestionably a Court subordinate to the High Court, and therefore a special appeal will lie, unless any law for the time being in force provided otherwise. The provision relied on as taking away the special appeal is Section 102 of Act VIII of 1869 B. C. Now that section does not in express terms take away this power of special appeal, for it says, "Nothing in this Act contained shall be deemed to confer any power of appeal in any suit tried and decided by a District Judge originally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, in which suit a question of right to enhance or vary the rent of a ryot or tenants, or any question relating to a title to land, or to some interests in land as between parties having conflicting claims thereto, has not been determined by the judgment."

I am clear that the special appeal given generally by Section 372 of Act VIII of 1859 cannot be taken away by implication, but by express provisions restricting the general rights, and even if we were of opinion that the Bengal Legislature intended to take away any right of special appeal, the question would arise whether that legislature under the powers conferred on it by the statute of 1861 could take away the jurisdiction of this Court.

Now in the very important case lately decided by this Court, (the Queen *versus* Burah and another), it was, I think, conceded on behalf of the Crown and assumed in the judgments delivered by the learned Judges, that the only authority which could take away the jurisdiction of the High Court was with the Governor-General in Council.

It was suggested by the vakeel for the appellant in this case that the class of suits to which the appeal belongs is a special class, relating to special subjects, and that it was the creation of the Bengal Legislature, and that therefore the right of appeal would not exist unless it was expressly provided for by the legislature which created it.

Suits for rent have been within the cognizance of Courts in British India ever since I believe the foundation of that empire, and between the years 1799 and 1859 subject to a double jurisdiction, that is to say, to the Court of the Collector and then by a sort of appeal to the Civil Court. By the Act of 1859 the double jurisdiction was abolished, and then suits for rent became cognizable by the Revenue Courts alone. But the Act (X) of 1859 made the orders of the Revenue Courts and also of the District Courts with a reservation subordinate to them subject to final appeal by the Sudder Court, and this Court when established undoubtedly inherited the jurisdiotion of the Sudder Court. The effect of the latter enactment, Act VIII. of 1869 B.C. has been to throw rent suits into the great mass of litigation cognizable by the Civil Courts under the first Section of the Civil Procedure Code.

The present suit therefore being cognizable by the Civil Court, and being heard in appeal by a Court subordinate to the High Court, there is, I apprehend, nothig in Section 102 of the Bengal Act to take away the right of appeal, and such right can only be restricted by competent legislative authority.

This view is not new to me. I have often considered it, and in the case reported in XXI. W. R., p. 320, these doubts were intimated in these words in my separate judgment. "For this reason, I think that whatever exemption from appeal is conferred by that Section is limited to the decisions of District Judges." In saying that I left myself free for the future consideration of this question.

For these reasons I think that the efficacy of Section 102 ought to be referred for the decision of a Full Bench.

Mr. Justice White.—I concur.

The judgment of the Court was as follows :—

Ainslie, J.—By 24 and 25 Vic. C. 104, S. 9, the High Court is vested with all powers and authorities that may be conferred on it by Her Majesty's Letters Patent, and subject to the legislative control of the Governor-General in Council with all the then existing powers of the Sudder Dewani Adawlut.

By Section 15 of the Letters Patent of 1862 this Court was constituted a Court of Appeal from the Courts from which there was then an Appeal to the Sudder Dewani Adawlut, and was directed to exercise jurisdiction in such cases as were then subject to appeal to the Sudder Dewani Adawlut by virtue of any existing law or

which might thereafter be made subject to appeal by any law or regulation made by the Governor-General in Council.

By Section 16 of the Letters Patent of 1865, this Court is constituted a Court of Appeal from all Courts subject to its superintendence, and directed to exercise appellate jurisdicion in such cases as were then (in 1865) subject to appeal to it by virtue of any law or regulation then in force.

In 1861, 1862, and 1865 alike, there was at least one class of suits in which the Sudder Dewani Adawlut or the High Court had no power to interfere on special appeal, namely, the class of rent suits falling within the provisions of Section 153, Act X. of 1859. This Court neither inherited a power to interfere in such suits from the Sudder Dewani Adalut, which had not got it, nor took it as a new power under the first or second letters patent.

The words of the first charter "in such cases as are subject to appeal to the said Court of Sudder Dewani Adawlut" distinctly limit the appellate powers of this Court.

Under the second charter it can only be held that it gives a power of dealing in appeal with the class of cases now under consideration if it was given by the laws in force in 1865. The general law of appeal was Section 23, Act XXIII. of 1861; but this general law was rendered inoperative in certain cases by Section 153 Act X. of 1859, and as by this law there was no first appeal in certain cases. The Special Appeal Section (372, VIII., 1859) had nothing to operate upon.

By Section 33, Act VIII. of 1869 (Bengal Cl.) the jurisdiction of the Collectorate Courts was brought to an end, and all suits theretofore triable in such Courts were made triable by the ordinary Civil Courts, and by the next section it was provided that the procedure was to be regulated by the Code of Civil Procedure law, as in this Act might be otherwise provided.

The 102nd Section is one of those ections in which a different procedure is provided, and, therfore, unless Section 34 can be got rid of there can be no special appeal.

It seems to me that Section 372, VIII., 1859 does not override Section 34, Act VIII., 1869 (Beng, Cl.)

In order to introduce Section 372, VIII., 1859, it must be held that the provisions of Section 153, X., 1859, were based on the constitution of the Court from whose judgment the appeal was taken

away and not on the character of the suits in which it was forbidden.

Such a view seems to me to be distinctly negatived by Section 27, XXIII., 1861, as to which there can be no doubt that the character of the suits is the foundation of the law.

But if the limitation of appeals established by Section 153,X., 1859, of the Governor-General in Council affected suits, and was not in respect of Courts, then Section 372 is as much qualified by Section 113, Act X., of 1859 as it admittedly is by Section 27., XXIII., 1861, and the change of forum introduced by Act VIII. of 1869, has not the effects of removing the qualification.

Secection 34, VIII. of 1869, as carried out by Section 102, left the jurisdiction of this Court intact, and, is therefore, not open to the objection that no legislative power except that of the Governor-General in Council can alter the jurisdiction of this Court.

If I entertained any doubt on the subject, I should feel bound by the long established and never before questioned (as far as I know) practice of the Court.

Macpherson, J.—In my opinion the questions, which have been referred to us, are concluded by the uniform course of the decisions of this Court ever since Act VIII. of 1869, B.C. came into force, and cannot now be re-opened.

Many thousands of suits under this Act have been disposed of annually, and this Court has never in any one of numerous appeals which have come before it in these suits, doubted the power of the Bengal Council to pass the Act. If the uniform course of our decisions during these many years is wrong, it seems to me that it is a matter for the Legislature, and that it is too late for us now for the first time to say that the Act was made without jurisdiction in so far as it touches the High Court as regards the right of appeal or otherwise.

As to the particular issue arising in Section 102, it seems to me also to be concluded by the numerous decisions of the Court* (all taking the same view of the law) ending with the Full Bench case of *Brojo Misser* which was heard in March 1874 (13 B. L. R., 374) The question in that case was whether an additional Judge was a District Judge within the meaning of Section 102. The majority of

* See for example 18 W. R. 102, 8 B. L. R. 180, and 188, 10 B. L. R. Ap. 29 and 30,13 B. L. R. 377, 23 W. R, 171.

the Court held that he was, and therefore that under that section no appeal lay. Mr. Justice Jackson held that he was not, and therefore that the appeal did lie. But the report of that case does not show that any of the Judges doubted the effect to be given to Section 102, or conceived that in cases falling within that section there could be any appeal from the decision of the District Judge.

I consider that the matter referred to us has already been settled by these cases.

Markby, J.—I concur in the judgment of Mr. Justice Macpherson.

Jackson, J.—In answering on my part the question referred to the Full Bench, I have little to add to the reasons which I gave in referring this case. These reasons to my thinking have not been answered. It is suggested that the question raised here has been virtually decided by a long course of practice, and also by the ruling of the Full Bench in the case of Brojo Missioner against Mussamut Ablakhi Misra, and that we ought not, whatever our view might have been, if the question were now raised for the first time, to disturb sueh a course of practice. It seems to me, that although it is extremely desirable to maintain a long settled ruling in regard to matters on which the security of titles depends, or even where to arrive at a contrary decision would disturb the practice of inferior Courts, it is not necessary to do so in the present instance, where no man's title can be affected, nor can any possible inconvenience arise by the mere admission of the present appeal. It seems to me that in the first place the question has not been expressly raised and decided by a Full Bench, secondly that if as I think the law allows an appeal, we are not competent to deprive the appellant of his right merely out of deference to the practice of the Court; and thirdly, that to persist in an error merely because that mistake has been committed for seven years, is a course in which I am not prepared to concur. I would admit this Special Appeal.

Garth, C. J.—But for the long course of practice which has prevailed in this Court since the year 1869, and the Full Bench decision in the case of Brojo Misser *versus* Mussamut Ablakhi Misrani and others, 21, Weekly Reporter, 321, I should have been disposed to hold with Mr. Justice Jackson that a Special Appeal lay in a case like the present.

But I think it so extremely important that the rules of law prescribed by this Court should be settled and uniform; that I am unwilling to disturb a course of practice which as it seems to me has been confirmed by a Full Bench decision.

It is true that in that case the point now before us was not directly argued, because apparently it was not considered arguable, but the decision of it appears to me to have been involved in the Full Bench judgment, because the Court there held that under circumstances similar to the present, a Special Appeal does not lie from an Additional Judge to this Court, any more than from a District Judge.

That ruling does in my opinion virtually determine the question now referred to us.

The Special Appeal will, therefore, in conformity with the judgment of the majority of the Court, be dismissed with costs.

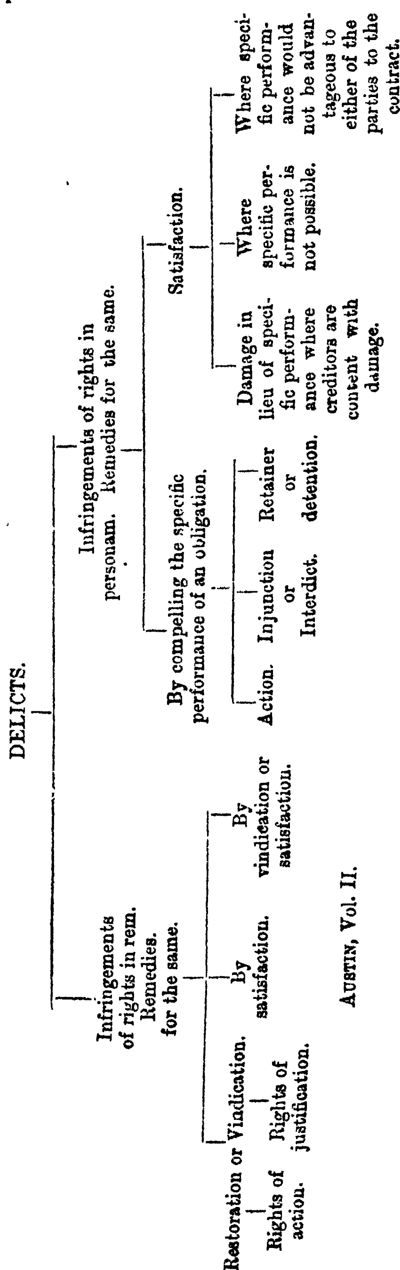
A COMMENTARY ON THE SPECIFIC RELIEF ACT.

A commentary on Act I of 1877 has lately been published by Baboo Boroda Prosonno Shome. The *Hindoo Patriot* in taking notice of this publication says:—"The plan followed is excellent. The scope of each section is explained; it is further elucidated with notes from legal textbooks bearing on the subject; sometimes it is followed by intelligent criticisms from the annotator suggested by his own judicial experience, and knowledge of the country. As the Specific Relief Act is too technical and not easily understood by the legal profession in the Mofussil, this commentary will be highly useful to them. Baboo Boroda Prosonno deserves great credit for the labor, research, and judgment, which he has brought to bear upon his work."

We fully indorse the above opinion and have no hesitation in recommending it to the legal public as a very valuable work, as will be seen from a perusal of the following extracts from it:—

"INTRODUCTION.

Of the three classes of rights, *viz.*, natural, moral, and legal, a protection of the last forms one of the chief duties of a good Government. A right then being the creature of Law, implies an obligation or sanction, and an obligation or sanction supposes an injury or wrong. In other words a wrong being the breach of an obligation by commission or omission, the ends of all sanctions or laws are, 1*stly*, the prevention of injuries, and 2*ndly* the redress of damages. Hence, every injury implies a remedy for "*ubi jus ibi remedium* or there is no wrong without a remedy." Broom's Legal Maxims, p. 146; and a remedy corresponds to a right. As a legal right is either a *jus-in-rem* or a *jus-in-personam* each kind of right supposes a peculiar remedy for its breach. Hence remedies having reference to infringement of rights in *rem* are, 1*stly*, either restorative or vindicative, 2*ndly*, by satisfaction, or 3*rdly*, by both vindication and satisfaction, and in relation to rights in *personam* they are either by satisfaction or by specific performance of an obligation (*Vide* the marginal table by Austin.)



AUSTIN, Vol. II.

"It follows from the above premises that so long as the protective law of a country does not provide for all the modes

of relief it is fundamentally defective, and as an adjective participle in a sentence becomes of no use unless there be a substantive for its qualification, though the wholesome provisions of (Sections 93, 192, and 200 of) Act VIII of 1859, did by implication authorize the granting of specific relief in some cases, still it, in the absence of a substantive law specifying the breaches of rights and duties to be governed by it, was of little effect, and further being hampered by the technicalities of judicial decisions did in practice but very little good. Besides that Act contemplated and provided for a small area of relief. Hence the Specific Relief Act supplying what was heretofore a desideratum, its advantages cannot be too highly extolled. The introduction of such a Law is also supportable on general principles of Equity; for it is a maxim that 'Equity will not suffer a right to be without a remedy.' (1, Cru. Dig. X, 150; Smith's Manual of Equity, p. 10.) The Act consists of 3 parts. Part I explains certain terms and enunciates the different forms of relief as well as points out the cases, where Specific Relief cannot be had. Part II treats of the various forms of the restorative or vindicative relief, and Part III of preventive relief."

"PART II.

OF SPECIFIC RELIEF.

CHAPTER I.

OF RECOVERING POSSESSION OF PROPERTY.

"The right of possession must be distinguished from the right to possess. The right of possession is that right to possess, which begins from the fact of an adverse possession not beginning through violence. As regards all but the person whose right is exercised adversely the person who acquires the right of possession is clothed with the very right which he affects to exercise and as against the person whose right is exercised adversely he may acquire the very right through the title or mode of acquisition styled prescription. In other words, *the right of possession ripens by prescription into the right of dominion or property.*" (Austin's Jurisprudence).

(a.) Possession of Immoveable Property.

Property or dominion denotes literally a right independent in point of user, unrestricted in point of disposition and unlimited in point of duration over a determinate thing. In this sense it does not include a servitus which is a right to deal with or use in a given or definite manner a subject owned by another, *e. g.*, a right of way, a right of common (or of feeding one's cattle on land belonging to another) or a right of tithe (Austin vol. II, p. 820). In popular language however the distinction between a servitude and a dominion or property is not often maintained.

The word "immoveable property" signifies not only land but also "any interest arising out of land, and land comprehendeth any ground soil or earth whatever as meadows, pastures, woods, moors, waters, marshes, furzes, and heath." Co. Litt. 4a; 2 Blac. Com. p.18. Immoveable property "includes land, incorporal tenements and things attached to the earth or permanently fastened to any thing which is attached to the earth." (Act X of 1865, p. 12, Indian Succession Act) " Immoveable property includes land, building, hereditary allowances, rights to ways, lights, fisheries, ferries or any other benefit to arise out of land, things attached to the earth or permanently fastened to any thing which is attached to the earth, but not standing timber, growing crops, nor grass." (Act III of 1877, Indian Registration Act). Leasehold is immoveable property. Ullman and others *v.* The Justices of the Peace for Calcutta VII, B. L. R. App. 60. The interest of an heir according to the Hindu Law, expectant on the death of a widow in possession is not property (Ram Chundra Tantra Das VII, B. L. R. p. 34).

There may be property in a trade mark (*i. e.,*) an exclusive right to use it. Smith's Manual of C. L. p. 93. Again the right of advowson (which I suppose is equivalent to the right in Bengal of several mohunts to appoint the mohunt of a vacant gaddee) and the right of borga or the right of the owner of a land of receiving a portion of the produce grown by the cultivators as well as the right to receive rent are all immoveable property. A chose in action generally *qua* chose in action is not property (Chandra Kanta Bhattacharya. 1 B. L. R. Ac. 177).

A chose in action in respect of realty is immoveable property, but it is doubtful whether a chose in action in respect of chattels as

well as contracts come under the category of immoveable property. A chose in action for torts to person is not property per Phear, J., in Chandra Kanta Bhattacharya.

8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.

(Sections 199, 223—24 of Act VIII of 1859) of (Sections 263 and 264 of Act X of 1877).

The term possession is to be understood as distinct from ownership or property. "Bare possession constitutes a sufficient title to enable the party enjoying it to obtain a legal remedy against a mere wrong-doer" (Austin vol. II, p. 820 *et se qua* ; Jowlabaksh *v.* Dharm Singh, X. Moore's I. A., p. 528 ; Rajah Maheshnarayan Singh, IX. Moore's I. A., p. 324 ; Clarke *v.* Brindaban Chandra Sirkar, Marshall, p. 75.) Hence he who is in possession of an immoveable property though wrongfully as regards some particular individual, may maintain an action of trespass against all others (1 Blac. Com.) see also Dyson *vs.* Collins, 5 B. and Ald. 600 or Br. L. M. p. 292, foot-note. Possession might be actual or constructive; thus, when immoveable property is let to another, the tenant has an actual and a landlord a constructive possession. In order to maintain an action under this section there *must be a right to immediate possession* of the property ; hence a mortgagee of land cannot maintain an action against the occupier of land before a decree for foreclosure, Broom's Com., p. 766—67. Jageswar Singh, F. B. 1, I. L. R., p. 311 ; nor can a reversioner sue for possession during the continuance of a life-interest (Sarat Chandra Sen, 7 Suth. W. R., p. 303). In order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the real owner he must prove either direct or constructive notice of the real title. Ramkumar Kunda, XI. B. L. R., p. 46 P. C.

9. If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit.

The fee chargeable in suits under this Section shall be half of that prescribed in the scale of fees for plaints mentioned in Schedule I, Article 1 of Act VII of 1870. Govt. Order No. 2127, dated 27th July 1877.

The former laws to the same effect were Act IV of 1840 and Act XIV of 1859, Sec. 15.

Three things are essential for the maintenance of an action under this section, *viz.*, *1stly*, that plaintiff must be in *actual possession at the time of dispossession* by the defendant. (This is the logical inference from the views expressed by Loch J. in Haradyal Bose, XVII, W. R., p. 70.) *2ndly*, dispossession without the plaintiff's consent. *3rdly*, dispossession by the defendant "otherwise than in due course of law." Actual possession is "where a person takes tangible and visible possession of a thing or enjoys the rents and profits of the same" per Stuart, C. J., in Jugeswar Singha F. B. 1 I. L. R. Allah. p. 311.

Hence no suit would lie under this section and in respect of immoveable property which is in the nature of an easement or other right of which the plaintiff cannot recover *actual possession* (Haradayal Bose, petitioner *v.* Krisna Gavinda Sen XVII. W. R., p. 70.) One argument against this view might be advanced on the ground that the word "immoveable property denotes an easement as well as land and must be supposed to have been used in the sense *here*, as in other sections of the Act ; but the futility of the argument is obvious, for no suit can lie under this section in respect of a right of advowson (see defn. given above.) On the same principle it might be suggested that no suit can be maintained under his section by one co-sharer singly in respect of his share, against a person who evicts all the shareholders simultaneously from the possession of a joint property ; for the share of one of several co-parceners being undefined and not specific he cannot recover actual possession of it. It is also to be borne in mind that no servant or other person, who is in charge of any property on behalf of his master and whose possession amounts to that of the former (section 18 of Act XLV of 1860), can maintain an action under this section. The words "in due course of law" do not imply dispossession under colour of a legal process, and so it is doubtful whether A, being ousted from land *m* by B, in execution of a decree for land *n* against C, may not bring an action under this section against B, for a man whose possession is unlawfully invaded is not bound to give effect to that invasion because it is made under colour of a legal

process (Mohan Dass *v.* Gavinda Dass P. C. Suth. p. 644.) Besides the significant fact of the substitution of the preposition "in" in the present law for the word "by" in the former law (Section 15, Act XIV of 1859) does in my supposition support the view in favour of the maintenance of such a suit. It is however now a settled law that a person dispossessed in execution of a possessory decree against a third party can seek redress under section 230 of Act VIII of 1859 (Brammamayee Deby *v.* Barkat Sirder F. B. IV B. L. R. p. 94.)

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

This is a novel proviso and is perhaps founded on the maxim "Rex. nonpotest peccari" or "The king can do no wrong" Broom's Legal Maxims, p. 40.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

This is a reproduction of section 26 of Act XXIII of 1861. Hence this proviso does not militate against the general powers of superintendence vested in the High Courts, by the Statute XXIV and XXV. Vic. Cap. 104, section 16 of Charter of 1865 corresponding to § 15 of the Letters Patent of 1862.

(b.) Possession of Moveable Property.

Moveable property.—The words "Moveable property" are intended to include corporal property of every description, except land and things attached to the earth (*vide* Act XLV of 1860. page 7.)

"Moveable property" includes standing timber, growing crops, grass, fruit upon and juice in trees and property of every other description except immoveable property. (Indian Registration Act III of 1877. Indian Council.)

Game killed on the land of A by a trespasser is A's property. Sm. Manual of C. L. p. 93. A thatch, especially when severed from the house, is moveable property (Raj Kumar Mukherjea

VII, B. L. R. app. 41) A hut is not moveable property (Nattan Mia *v.* Nanda Ram VIII, B. L. R. p. 503.)

10. A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure.

(Sec. 200 of Act VIII of 1859) or (S. 259 of Act X of 1877 the new Civil Procedure Code.)

A right to property (absolute or special) is distinct from a right to the possession of goods and in order to support an action of trover, there must be a right to *property* as well as a right to possession. Br. Com. p. 791, 828. Thus a lessor cannot maintain an action of trover for the furniture of a house let to hire or demised to another if wrongfully taken by a third person (Gordan *v.* Harper T. T. R. 9 and Br. p. 791.) Where goods are bailed and the bailment is determined by the tortious act of the bailee (as by selling the goods) the property therein reverts at once to the bailor, so that he will be entitled to recover the goods or their value in trover even from a *bonâ fide* purchaser otherwise than in market overt Bryant *v.* Wardell 2 Exch. 479 Br. 828. "When goods have been wrongly removed an action of *trespass* may be maintained by the person who was in actual or had a constructive possession of them in respect of a vested right in them." Addison on Torts. 183, Br. Com. 121—2.

Possession might be actual or constructive, *e. g.*, in the case of an executor his right to the goods of the testator accrues immediately on his death, and such right draws after it a constructive possession "so that the executor may maintain trespass for goods of the testator taken between the death and grant of probates, as also the administrator will have the same remedy for goods taken between the death and the grant of letters of administration" (Br. Com. p. 797).

EXPLANATION 1.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

Thus a guardian of an infant under Act XL of 1858, or a manager of a Lunatic appointed under Act XXXV of 1858 may maintain an action for the possession of property under this sec-

tion; so a *shebait* of a Hindu idol or a Mutwalli of Mahomedan mosque may sue.

A Hindu widow is not a trustee. (Huri Das Dutt *v.* Apoorna Dassi, 6 Moore's I A., p. 438; Chundrabolly Debia *v.* Brody, 9 W. R. p. 584).

EXPLANATION 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

(Engleton *v.* The East India Railway Company, VIII, B. L. R. p. 581). Hence if goods are taken from a bailee either he or the bailor may maintain trespass "per Parke B. in Reg *v.* Vincent, 21 L. J. M. C. 109." Thus a carrier may maintain trover against a stranger who takes the goods out of his possession; so also a factor, a ware-house-keeper, an auctioneer, pawnee, licensee, gratuitous bailee may sue (Br. Com. p. 826—27; Com. Digest Trespass, Story on Bail, 5th Edn, p. 124.)

Illustrations.—(*a*). A bequeaths land to B for his life, with remainder to C. A dies. B enters on the land, but C, without B's consent, obtains possession of the title deeds. B may recover them from C.

A trustee is entitled to have the muniments of title and in fact it is his duty to keep them in his possession (2 Sp. 46.)

(*b*). A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody.

(*c*). A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B.

(*d*). A deposits books and papers for safe custody with B. B loses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under section 168 of the Indian Contract Act, 1872.

(*e*). A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

11. Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases :—

(*a*) when the thing claimed is held by the defendant as the agent or trustee of the claimant ;

"An agent" is a person employed to do any act for another, or to represent another in dealings with third persons (see Sec. 182 of Act X of 1872). Auctioneers, brokers and factors are agents. Hazari Mall Nahatta, IX, B. L. R. p. 1; Baldeo Narayan *v.* Scrymgeour, 6 B. L. R., p. 58. per Paul and Norman J. J. Under this comes the three classes of bailments, *viz.*, 1*st* when the trust is exclusively for the benefit of the bailor, 2*ndly*, when the trust is exclusively for the benefit of the bailee, and 3*rdly*, when the trust is for the benefit of both parties. This class includes tailors, pawnbrokers, carriers, (Br. Com. p. 804.) If a trustee conveys or assigns the trust property for valuable consideration in violation of the trust to a person who is aware of that circumstance or conveys or assigns it without valuable consideration, even that person will be treated as a trustee for the *cestuique trust* (see the notes under S. 10, Explanation I). An exception to this rule is in the case of goods pledged by the testator redeemed by the executors with thier own money ; for "there the law doth convert so much goods as amounts to that value in their property and give them leave to retain so much goods by way of allowance." Bacon's Maxims. Regula IX.

(*b*) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed ;

(*c*) when it would be extremely difficult to ascertain the actual damage caused by its loss ;

(*d*) when the possession of the thing claimed has been wrongfully transferred from the claimant.

Illustrations—Of clause (*a*)—A, proceeding to Europe, leaves his furniture in charge of B as his agent during his absence. B, without A's authority, pledges the furniture to C, and C, knowing that B had

no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee.

For a purchaser of goods or chattels acquires no title (Smith's Manual of Com. Law. p. 158 ; Smith Man. of Equity.)

of clause (*b*), Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

The rights of joint owners of an idol are discussed in Mitakanta Audhikari, XIV. B. L. R., p. 166.

of clause (*c*)—A is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of too special a character to bear an ascertainable market-value. B may be compelled to deliver them to A.

CALCUTTA HIGH COURT.

The 24th April 1877.

PRESENT :

Mr. Justice Markby and Mr. Justice Prinsep.

Special Appeal, No. 1678 of 1875, from the decision of J. Tweedie, Offg. Judge of Burdwan, dated the 9th June, 1875, confirming a decree of Baboo Gobind Chunder Ghose, Munsif of Bishtopore, dated 30th May, 1874.

SHIRO KUMARI DEBI* (Defendant) *Appellant,*

versus

GOVIND SHAW TANTI (Plaintiff) *Respondent.*

Declaration of Title—Adverse Possession—Case made in Plaint—Issues.

A declaration of title may be made upon proof of twelve years' adverse possession. Such declaration cannot, however, be given on a title not distinctly stated in the plaint or in the issues.

Tirumalasami Reddi v. *Ramasami Reddi* † dissented from.

Ram Lochun Chuckerbutty v. *Ram Soondur Chuckerbutty* ‡ followed.

THIS was a suit for the confirmation of possession of, and the establishment of the plaintiff's jamai right in, 7 bigas of kheraji jamai lands, and for the setting aside an order and subsequent sale made in an execution-proceeding under s. 246 of the Code

* Vide Indian Law Reports, 2. Calcutta Series p. 418.

† 6 Mad. H. C. Rep., 420. ‡ 20 W. R., 104.

of Civil Procedure. The plaint stated that the lands in question were portion of an estate which originally belonged to one Ram Dhoba, and that the said Ram Dhoba sold them under a khosh-kobala to one Lochunkali, from whom the plaintiff purchased the said lands under a kobala on the 14th Joist, 1269 (27th May, 1862), since which time the plaintiff had been in possession of the said lands through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. The second issue fixed by the Munsif and the only one now material, was, "whether the disputed land was held by Lochunkali by virtue of purchase, and is held by the plaintiff as alleged by him." The Munsif held the plaintiff entitled to the relief sought for, on the ground that he had proved his own possession, and that of his predecessor Ram Dhoba, for twelve years before the institution of the present suit. The Civil and Sessions Judge, after remanding the case for further evidence, dismissed the appeal by the defendant, on the ground that the plaintiff and his vendor Lochunkali had together enjoyed twelve years' actual possession of the disputed property before filing his present suit for the establishment of his right and title, and was therefore, entitled to a decree.

The defendant preferred a special appeal to the High Court.

Markby, J.—This is a suit brought under the provisions of s. 246 of the Code of Civil Procedure for setting aside an order made in an execution-proceeding taken in respect of certain land, of which the plaintiff claims to be the owner. He put in a claim under s. 246, and failed; and thereupon he brought this suit, to use the words of that section, "to establish his right." He sets out his title saying that the land of which he claims to be the owner appertained to 23 bigas 11 cottas 7 chittaks of land which belonged to one Ram Dhoba; that out of the said land, Ram Dhoba sold 7 bigas, which are in dispute, to Lochunkali; that while Lochunkali was in possession of the said land, he sold it to the plaintiff under a kobala of the 14th Joist, 1269. "Since then I have been in possession of the same through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. To this there was no objection offered by any body."

Various issues were raised; and one of those issues, or rather part of one of those issues, is this,—Is the disputed land held by the plaintiff as alleged by him? Ultimately, after a remand,

the Lower Appellate Court was not satisfied that the plaintiff had established the precise title which he had set up, but it was satisfied that he had been in possession for twelve years; and upon that ground gave him the declaration which he asked.

Now, in the first instance, it was broadly contended before us, that, in a suit of this kind, no declaration of the plaintiff's title can be made merely upon twelve years' possession; and in support of that, a decision of the Madras High Court, *Tirumalasami Reddi* v. *Ramasami Reddi* (1) was relied on. With the general proposition there laid down, I must say I am unable to agree: it is in direct conflict with a decision of this Court in *Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (2)—the decision of Sir Richard Couch and Mr. Justice Glover, wherein it is laid down in the most distinct terms that a declaration of title may be made upon proof of twelve years' possession. Sir Richard Couch says:—"What the plaintiffs sought was a declaration of title to this share in the land, and the first Court had given them that. They having been in possession of the land for more than twelve years, the title of any other person had been, to use the language of the Judicial Committee in the case of *Gunga Gobind Mundul* v. *The Collector of the 24-Pergunnahs* (3), extinguished in their favour. The effect of their possession was to extinguish other titles, if any existed; and we think, in a suit of this kind, although they failed to satisfy the Court that their title to the land had been acquired in the way they stated, if in fact they are entitled to it, they ought to have a declaration to that effect, and not be driven to bring another suit in which they would omit any statement of the manner in which they became entitled, and simply say that they were entitled to it, and that they had been in possession of it for a greater number of years, more than sufficient to bar all other claimants by the law of limitation, and ask for a decree on that ground."

It appears to me that if we look to the reason of the thing, we could come to no other conclusion. The plaintiff comes into Court, as for this purpose we must assume that he has a right to come, to prove his title. There is no reason whatever why

(1) 6 Mad. H. C. Rep., 420. (2) 20 W. R., 104,
(3) 11 Moore's I. A., 345.

he should not prove his title by any mode which will show that he has a good title, and when once the law has declared that twelve years' possession is a good title by itself, I do not see how it is possible that the Court can refuse to recognize that, any more than it can refuse to recognize a conveyance from a previous owner.

Then it is said that there are decisions of this Court in which a contrary view has been taken. The decisions relied on are: *Moulvi Abdoollah* v. *Shaha Mujeesooddeen* (1), *Court of Wards* v. *Radhapershad Sing* (2), *Bijoya Debia* v. *Bydonath Deb* (3), *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (4). Now it is possible that there may be some conflict between the two last of those decisions and the decision of Sir Richard Couch, to which I have already referred, upon one point. Sir Richard Couch clearly thought that if the question of twelve years' possession was properly raised in the issues, the suit ought not to have been dismissed although the title had not been based upon that ground in the plaint. Possibly, I do not say that it is so, possibly there may be a conflict between the two last decisions and the decision of Sir Richard Couch upon that point; but we need not consider that, because I do not think that, upon the two important points which arise in this case, there is any conflict between the decision of Sir Richard Couch in *Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (5) and the other decisions. I think, on the one hand, there is nothing which contradicts the decision of Sir Richard Couch, that a possession for twelve years is a good title upon which a declaration may be based; and on the other hand, I think, Sir Richard Couch clearly admits, what the other decisions expressly lay down, that the question of twelve years' possession must be raised in the issues. I think that appears from what Sir Richard Couch says, when dealing with the judgment of Sir Barnes Peacock, in the case of *Ram Coomar Shome* v. *Gunga Pershad Sein* (6). He says there:—"The nature of the case, as appears from the papers," (that is, speaking of the papers of the case before Sir Barnes Peacock) "did not admit of the plaintiff's asking for what has been given to the plaintiff in this case by the first Court, namely, a declaration that he is the person entitled to the land."

(1) 16 W. R., 27. (2) 22 W. R., 238. (3) 24 W. R., 444.
(4) 25 W. R., 315. (5) 20 W. R., 104. (6) 14 W. R., 109.

It is precisely on that ground that the cases of *Bijoya Debia* v. *Boydonath Deb* (1) and *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (2), are distinguishable from the decision in the case of *Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (3). In the case of *Bijoya Debia* v. *Boydonath Deb* (1), Sir Richard Garth says: "This decision," speaking of the decision of the Court below in that case, "appears to us to be entirely beside the plaintiff's real claim and the issues which have been raised, and properly raised, in the Court below;" and so Mr. Justice Macpherson says in the case of *Bhayga Mutty Bibee* v. *Mahomed Wasil* (2): "The Lower Appellate Court ought not to have given a decree in favour of the plaintiff upon a ground which is not suggested in the plaint, or in the issues tried." It is quite clear that when a plaintiff claims a title upon twelve years' possession, he must draw the attention of the defendant to the fact that he is going to claim a declaration upon that title, in order that the defendant may give his own evidence and scrutinize the evidence of the plaintiff upon that point, and see whether possession for twelve years is proved, and whether he can contradict it during any portion of that period. I think, therefore, it is clear how we ought to deal with this case. We ought, on the one hand, to hold that the plaintiff may have a declaration of his title based on twelve years' possession, but that if he wishes to claim a declaration upon a title of that kind, he must at least clearly raise that question in the issues in the case. Now, therefore, we must examine what are the issues raised in this case. Some issues were raised by the District Judge on appeal, and were remanded to be tried by the Munsif. I am not at all clear what new points the District Judge desired to have tried, but this is immaterial, because the new issues contain nothing about twelve years' possession. We need only, therefore, look at the issues as settled in the first Court. As I have already shown, the form of the issue there was whether the disputed land was held by the plaintiff as alleged by him? The issue, therefore, refers us back to the allegations in the plaint, and no question can arise in this case as to what would be the result if the issues disclosed a new title.

(1) 24 W. R., 444. (2) 25 W. R., 315. (3) 20 W. R., 104.

Now let us turn to see what the allegation in the plaint is. When we come to look at the allegation in the plaint, I think it is not sufficiently clearly stated that the plaintiff intended to rely upon twelve years' possession. In fact, the plaintiff says that he has not been himself in possession for much more than eleven years, and though he is, no doubt, entitled to join the possession of his vendor to his own possession, yet he has not given the date when his vendor came into possession, nor does he even make the general allegation that the possession of his vendor, coupled with his own possession, would amount to a period of twelve years. It follows that the question of twelve years' possession has not been properly raised either in the plaint or in the issues in this case, and the defendant had no proper notice that such a point was going to be raised; therefore, it was not open to the Lower Appellate Court, having negatived the title which has been alleged by the plaintiff, to declare in his favour a title which had not been alleged. For those reasons I think that the decision of the Lower Appellate Court is wrong, and it ought to be reversed, and the plaintiff's suit dismissed.

I only wish to add that it is not necessary for us now to consider whether we ought to interfere in this case on the ground that the suit ought not to have been remanded. But I think it right to say that, as far as I can see, there was no ground upon which a remand ought to have been directed in this case. The plaintiff had had an opportunity of proving his title, but he had failed to do so; and having failed to do so, I think the Lower Appellate Court ought to have dismissed the suit, and not to have given the plaintiff an opportunity of producing any further evidence.

The suit will be dismissed, and the appellant will be entitled to her costs in this Court and in the Courts below.

I think it desirable to add that, in this judgment, I do not express any opinion as to whether a declaration can be given upon a title which appears in the issues but is not set forth in the plaint. I only say that a declaration cannot be given on a title not distinctly stated either in the plaint or in the issues.

PRIVY COUNCIL.

The 12th July 1877.

PRESENT:

Sir J. W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier.

Appeal from Calcutta High Court.

ADMINISTRATOR-GENERAL OF BENGAL, (Plaintiff) *Appellant,*
versus
JUGGESSAR ROY and others, (Defendants) *Respondents.*

Fraud—Misrepresentation—Concealment.

A transaction will not be set aside merely on the ground of inadequacy of consideration, unless the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition.

Tennent vs. Tennent, Law Rep., 2 Scotch Appeals, 6, cited and followed.

The judgment of their Lodships is as folows :

This suit was instituted by Mr. Robert John Jackson, who upon his death has been succeeded on the record by the present plaintiff, for the purpose of setting aside certain conveyances by him to the three first defendants of his interest in Mouzah Luchhipore, in the district of Ranigunge, on the ground, in the first place, that he was under age, and in the second place, that he was induced by the defendants, who were trusted servants, but who had abused their fiduciary character, to part with his property without fully understanding the nature of the transaction, and without adequate consideration. Mr. Robert John Jackson was the adopted son of a Mr. Robert Gwynne Jackson (who will be called Mr. Gwynne Jackson), who appears to have been of European extraction. The date of his adoption is one of the questions in the cause, the plaintiff alleging the adoption to have been about the year 1855, and the defendants as far back as 1850. Mr. Gwynne Jackson appears to have resided a great number of years in the neighbourhood, and to have been well acquainted with coal mining. He, in 1860, was the manager of the coal mines of Messrs. Apcar and Company, who, it may be observed by the way, entered into an agreement with Jackson, the plaintiff, to supply him with funds for prosecuting this suit, in consideration of, in the event of his succeeding, his granting them a coal lease.

Mr. Gwynne Jackson left the employment of Messrs. Apcar and Company in 1860, on account of their being dissatisfied with

him, but he continued afterwards up to about 1867 to some extent in their employment in a subordinate capacity, when he finally left it. He appears to have acquired some property, and to have been interested in other coal mines in the neighbourhood.

Shortly before the year 1860, which is the first date material in this case, Mr. Gwynne Jackson bought certain putnee and durputnee rights, including the coals in Mouzah Luchhipore, partly from the defendants. It is not disputed that by a deed, bearing date the 20th September 1860, he, being such putneedar and durputneedar, granted certain sub-tenures by way of durputnee and seputnee, reserving the minerals to three of the defendants; but one question in the cause has been, whether that deed was executed at the time it bears date, or at a later date not very clearly indicated on the part of the plaintiff, but which the Judge in the Court below has found to be the year 1869.

Gwynne Jackson made a will in 1868, leaving all his property to his son. Subsequently in 1863 he executed a *hibba*, which would have the effect of revoking that will, giving all his property, some of which had been acquired since the date of the will, to his son, and in fact denuding himself of all his property, if that *hibba* is to be taken as intended by him to be then operative.

The deeds, the subject of this suit, were executed in 1870 and 1871, and the last in 1872. These deeds may be divided into two classes. One class is that in which the plaintiff confirms the durputnee and seputnee rights, which were dealt with by the deed bearing date the 20th September 1860; the other class of deeds, which bear date in 1871, and one of them as late as June 1872, are deeds of sale, whereby he transfers all the superior interest which he had, together with the minerals which had been reserved in the former deeds.

With respect to one of the main questions in this case, which has been already indicated, namely, whether the conveyance, bearing date the 20th day of September 1860, was executed then or at a subsequent date, their Lordships have intimated in the course of the argument, that, on the whole, they concur with the finding of the High Court that that deed must be taken to have been executed at the time when it bears date. If that be so, being prior in time to the *hibba*, it is unaffected by that instrument, and the subsequent deed of 1870, being merely confirmatory of it, and conferring on the defendants no

greater interest than they took under it, is obviously of no importance, and may be allowed to stand with it.

The question remains whether the deeds of 1871 and 1872, conveying, as has been before stated, the remaining and superior interest, together with coals, are to be set aside on any of the grounds which have been alleged. With respect to this point their Lordships also intimated, during the course of the argument, that they saw no sufficient reason to differ from the conclusion of the High Court that the plaintiff had failed to sustain the burden of proof which lay upon him that he was a minor at the time of the execution of these deeds.

The question then arises, in the first place, whether it has been shown that the three first defendants (for it should be stated that the two last defendants are the sub-lessees under them) were in a fiduciary capacity or character to the plaintiff at the time of the execution of these deeds, and were therefore in a position to exercise undue influence over him. Upon this question their Lordships also have come to the same conclusion as the High Court. There is indeed some evidence that Haradhun Misser, the father of Juggeswar Misser, and the two Roy defendants, were at times employed in collieries in which Gwynne Jackson had a share; and there is also some evidence of the latter having acted as his gomashtas with respect to the property comprised in the deed of 1860, but the decision which their Lordships have come to, concurring with the High Court, on the subject of this deed, in a great measure disposes of this class of evidence. Their Lordships see no reliable evidence on the record that, at the time of the execution of these documents by the plaintiff, they were in any fiduciary character *quoad* him, or in a position unduly to influence his judgment. If that be so, the question is narrowed to whether a fraud was practised upon him.

It is contended, in the first place, that the nature of the transaction was misrepresented to him; that the defendants represented to him that he was not parting with his mining rights by these deeds, whereas he was, and that the deeds were not explained to him; further, that the sale price was inadequate.

With respect to the deception so alleged to have been practised upon him, the only evidence to be found of it is the evidence of the plaintiff himself, and that evidence is described as untrustworthy

by the learned Judge of the inferior Court, who found in the plaintiff's favour. There is no confirmatory evidence of this, and there is contradictory evidence to the effect that the deed was read over and explained to him, and that he understood the language in which it was written.

The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent* v. *Tennent* (2nd Law Reports, Scotch Appeals, p. 9,) in which Lord Westbury very shortly and clearly stated the law upon this subject. He says: "The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition."

Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about, or was the victim of some imposition. It should be borne in mind that his father Mr. Gwynne Jackson was at hand, and their Lordships concur with the view of the High Court that Mr. Gwynne Jackson, by the *hibba* of 1863, did not intend to denude himself of all his property in favour of his son, whom he represents at that time to have been eight years old, and who could not have been more than twelve or thirteen. It probably was a device for the purpose of defeating existing or possibly future creditors. Gwynne Jackson himself acted in contravention of that deed, for he sold a property soon after its date without any reference to it, and there is evidence that he continued to act as if he were the owner of the property. Gwynne Jackson was very conversant with coal-mining and the character of property in the district, and their Lordships are not satisfied that he was unable to manage his own affairs, or to give competent advice to his son until the year 1872, in the early part of which he was admitted to an hospital with an incurable disease, of which he died in about the middle of that year. He had granted his property to his son by a *hibba*, intending nevertheless to keep in

his hands the control of it through his life, but very probably intending it to operate after his death in favour of his son. His son no doubt had an interest in the property as well as himself, and probably the true view of these transactions in 1870 and 1871 is that they were in substance joint transactions by the father and the son. Their Lordships cannot, therefore, regard the son at these dates as altogether in the position of a minor without any one to advise him. It may be observed that the deed in 1872 was but the completion of the previous transactions.

Independently, however, of this consideration, it cannot, their Lordships think, be said that the purchase-money was so grossly inadequate that its inadequacy amounts to proof of an imposition upon the plaintiff. It is true that there is some evidence, the value of which it is difficult precisely to estimate, that property with coal sold in the neighbourhood for some years' purchase greater than the number of years' purchase for which this property sold, which was with respect to a portion of it twelve years' purchase, and with respect to another portion of it ten years' purchase, and there is evidence, which perhaps is the strongest on this part of the case, that soon after the purchase by the defendants, they let a portion of this property on mining leases at a considerable rental, or more, properly speaking, royalty. It should be observed, however, that these leases give the power to the lessee to terminate them at any time, and *non constat* how long the high rental would continue.

It has been suggested that the defendants must have known that there was coal under the land, and that they concealed their knowledge from the plaintiff. Even if it were so, putting aside their fiduciary character, and in the absence of any proof of fraud, that would not be enough or vitiate the transaction; but in point of fact their Lordships can find no evidence of this. All the evidence is the other way, namely, that they did not discover the coal until after they had made the purchase; and it may be observed that Gwynne Jackson himself had tried for coal without being able to discover it. It appears, therefore, to their Lordships that this last ground on which it is sought to impeach the validity of the deeds also fails.

On the whole, therefore, their Lordships are of opinion that the High Court was right in affirming the validity of these deeds and dismissing the plaintiff's suit; and they will therefore humbly

advise Her Majesty that the judgment of the High Court be affirmed and this appeal dismissed, with costs.

CALCUTTA HIGH COURT.

The 6th August 1877.

PRESENT:

Mr. Justice Jackson and Mr. Justice McDonell.

In the matter of KOOKOR SINGH, *Petitioner.*

Code of Criminal Procedure, Section 505—Bad livelihood—Charge—Notice of precise matter proved—Witnesses—Bail.

A person against whom proceedings for bad livelihood have been taken is entitled to have embodied in a charge the precise matter which the Magistrate considers established by evidence against him. It is not sufficient to say generally that there is suspicion.

He should be asked to produce his witnesses, or offered assistance to procure their attendance.

He should be admitted to bail. A Magistrate is not competent to refuse bail unless the law sanctions such refusal.

This was an application to the High Court, as a Court of Revision, to set aside an order of the Magistrate of Dinagepore, requiring the petitioner to give security for good behaviour under Section 505 of the Code of Criminal Procedure.

JACKSON, *J.*—We have considered the Magistrate's further proceedings in the case of Kookor Singh, charged under Section 505, Code of Criminal Procedure.

It appears that, on receipt of the orders of the Division Court quashing the previous decision in his case, Kookor, being released, was immediately re-arrested and placed on bail by the Joint Magistrate on the 18th May.

The Magistrate ordered on the 21s that the case should be heard on the following day, and accordingly on the 22nd the accused was further examined.

The questions put to him were: Whether he had witnesses touching the charge against him, to which he answered that he had. Whether he had anything to answer as to the suspicion against him, to which he answered that he was at enmity with the Darogah and with Joynarain. What quarrel he had with the Darogah?

Answer: That quarrel related to his demand of the price of some articles of food supplied, which price the Darogah had not paid. Whether his witnesses were in attendance? *Answer:* They are not. Why he had not brought them? *Answer:* They will not come at my request. Whether he had applied for *tulub* (meaning the Magistrate's process) on them? *Answer:* No. Whether he had filed a nominal roll *(ismnavisi)* of them? *Answer:* No. Whether he had any objection to give security? *Answer:* My quarrel with the Darogah. Whose ryot he was? *Answer:* Names his landlord.

The order (of same dade) on this is that the accused do remain in *Hajut* (lock up) till 4th June.

A note in the English language signed by the Magistrate, no doubt, says that Kookor Singh is remanded "for such evidence as he can bring," but there is nothing to show that he (Kookor) was made aware of the Magistrate's object or intention in making the order.

Manifestly he was neither asked who his witnesses were, nor whether he now desired the assistance of the Court, though he had already stated that the witnesses would not attend without process. On the day appointed, a pleader appeared on the prisoner's behalf and tendered a list of 16 witnesses for the defence, but the Magistrate, observing that the case had stood over long enough, refused to allow any further adjournment, and, overruling certain objections advanced by the Pleader, made the order now complained of.

Taking this order by itself, *i. e.*, without reference to former proceedings in the case, it appears to us open to the following serious objections :—

1. The accused has really no notice of the precise charge on which he is brought before the Magistrate. He is entitled unquestionably to have the precise matter, which the Magistrate considers established by the evidence against him, embodied in a charge. It is not sufficient to say generally that there is suspicion.

2. The accused was, by the Magistrate's procedure, absolutely deprived of the means of defending himself. He was not told that he was to produce his witnesses, or offered assistance in procuring their attendance, or even asked who they were, and when he made application by a Pleader his request was refused on the ground that it was made too late, although he had not been warned to make it before.

3. The accused was without authority of law, put in *Hajut* or close custody, pending the final hearing. The Magistrate justifies this on the ground that the charge is cognizable by the Police. This is no more decisive of the question than is the rule in Section 515 that the evidence is to be taken as in summons cases. The Magistrate is not competent to refuse bail unless the law expressly sanctions the refusal, and it is clear that when the Magistrate, by his final order in the case, has no power to commit the accused to prison except in case of his failure to give bail, he cannot do so, except in the like case pending enquiry.

The illegal order thus made was calculated, and has the appearance of being intended to cripple the accused as to his defence.

It is manifest, therefore, that the petitioner has not had a fair trial, and he is entitled to have the order quashed. These irregularities, however, assume a still more serious character when considered with what had taken place before in the case of the petitioner.

It appears that a previous order of the same Magistrate, based on the very same evidence and enquiry, had been set aside by an order of this Court on the ground set out in Judge's letter or memo. of 12th July.

It might have been expected, therefore, that in dealing further with the case, the Magistrate would have been specially careful to avoid the errors pointed out by the Division Bench.

Instead of this, the errors are repeated with an additional illegality; and the proceedings unfortunately shew not the slightest trace of a desire to afford the accused those advantages to which every person on his trial is entitled.

It is right to add that we are not favorably impressed by the evidence on which the Magistrate based his order, and consequently we see no reason to think that the release of Kookor Singh will lead to a failure of justice.

Magistrates, who act in the manner exemplified in this case, ought to bear in mind that they not only violate their duty as judicial officers bound to do justice indifferently, but even contravene their own object, as administrative officers, by rendering the supposed offenders objects of sympathy, as well as by ensuring their escape at any rate for the moment. The order is quashed.

CALCTTA HIGH COURT.

The 6th December 1877.

PRESENT:

Mr. Justice Markby and Mr. Justice Mitter.

SREEMUTTY GOLUCK MONY DEBIA and others
(Decreeholders) *Appellants,*
versus
MOHESH CHUNDER MOSA (Judgment-Debtor) *Respondent.*

Rent Decree for less than 500 *rupees—Act VIII (B. C.) of* 1869.
Section 58*—Limitation—Application for Execution—*
Fresh Application.

The true construction of Act VIII (B.C.) of 1869, Section 58, is that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment.

Rhedoy Krishna Ghose vs. *Koylash Chunder Bose,* 13 W. R. (F.B.) 3, cited and followed.

Lalla Ram Sahoo vs. *Dodraj Mahto,* 20 W. R., 395, dissented from.

Circular Order of the 10th of July 1874, discussed.

A rent decree was passed against the respondent, in favor of the appellant, on the 31st of January 1873. A general application for execution, both against the person and property of the debtor, was made and granted on the 5th July 1875.

The question in the case was: Whether the granting of this application would warrant the decree-holder in proceeding by successive steps, at one time against the property, and at another time against the person of the judgment-debtor, without making a fresh application.

Markby, J.:—In this case we think that the decision of the Moonsiff and of the District Judge was wrong, and that execution ought to have been allowed to issue. The decree was dated the 31st January, 1873, and was a decree for arrears of rent. On the 5th July 1875, the decree-holder applied for execution by arrest and by attachment and sale of the property of the judgment-debtor. On the 22nd of September 1875, the decree-holder informed the Court that the judgment-debtor had made a proposal for a compromise, and that it was not necessary that he should be arrested. Subsequently, he applied for attachment of the judgment-debtor's property; and, on the 15th of March 1876, that application was

disallowed on the objection of the judgment-debtor, upon the ground that under the Rent Law his property could not be attached until other steps were taken. Immediately upon this, the judgment-creditor made an application for the arrest of the judgment-debtor.

Now the Full Bench have laid down, in a case reported in 13 W. R., 3, F. B.; 4 B. L. R., 82, F. B.—Rhedoy Krishna Ghose *vs.* Koylas Chunder Bose (and that decision is binding upon us)—what the true construction of the section (58, Act VIII (B. C.) of 1869) is, which imposes a term of limitation of three years upon a judgment-creditor when applying for execution. The effect of that decision is stated in the judgment of Mr. Justice Macpherson, who says that "the words should be considered as meaning that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment. That I understand to be the decision of the majority of the judges of the Full Bench. That being so, the real question which we have to determine in this case is, whether the proceeding of the 17th March 1876 was a new and substantive application for execution, or whether it was merely a step taken by the judgment-creditor in furtherance of the execution for which he applied, and applied successfully, on the 6th July 1875. Now, one of the facts to be noticed in this case is, that the proceeding, which took place on the 17th of March 1876, and subsequent procedings, were all under the original number which was borne by the proceedings of 1875. I do not say that that was conclusive in the matter; but it certainly goes to show that the proceedings, which followed upon the application of the 17th March 1876, were not proceedings upon a new execution then for the first time issued, but steps taken in furtherance of the original application. Under all the circumstances of this case, we think that we are justified in saying that the steps taken for the arrest of the judgment-debtor in March 1876 were not new proceedings, but a continuation of the old proceedings. If that be so, then, according to the Full Bench decision, it is incumbent upon us to hold that they are not barred.

The District Judge has relied upon the terms of a Circular Order* of this Court. We do not at all wish to weaken the effect

* NOTE—In this Circular the Court intimated that in such cases "the same process of execution cannot be executed more than once, and directed that the reception of supplementary lists of property to be attached, or other devices by which the provisions of Section 58, Act VIII. (B. C.) of 1869, are evaded, may be at once put a stop to."—13 B. L. R, 62, High Court Rules, &c.

of any thing which is stated in that Circular Order. That Circular Order does not, and could not, affect the law as laid down by the Full Bench decision. Notwithstanding anything which is contained in that Circular Order, the question must be decided in the same way, *viz.*, by enquiring whether the application for execution, upon which proceedings were had, was made within three years from the date of the decree.

The vakeel for the respondent has also relied upon a decision in 20 W. R., 395—Lalla Ram Sahoo *vs.* Dodraj Mahto. All that is necessary for us to say upon that decision is this, that the question of delay on the part of the judgment-creditor is nowhere referred to by the Full Bench. It may be that the question of delay on the part of the judgment-creditor may, in some cases, be useful in assisting the Court to determine whether an ambiguous proceeding is a fresh application for execution, or a step taken in furtherance of a previous application. But there is nothing which will authorize us to import into the law of limitation, the question of diligence on the part of the judgment-creditor as a substantive portion of that law.

We think that the decision of the District Judge must be set aside, and the money deposited by the judgment-debtor must be paid out to the decree-holder. The decree-holder will be entitled to his costs in this Court and in the Courts below.

CALCUTTA HIGH COURT.

The 6th December 1877.

PRESENT:

Mr. Justice Ainslie.

RAKHALDAS BANDOPADHYA (Defendant) *Appellant,*

versus

INDRU MONEE DEBI (Plaintiff) *Respondent.*

Adverse possession—Co-sharer—Limitation—Secondary Evidence.

When one co-sharer sets up as against another adverse possession of land which had previously been waste, but at some former time had been occupied and then been admittedly held jointly, it is for him to show that he has held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to them.

Secondary evidence of a document should not be admitted unless the absence of the original is sufficiently accounted for.

AINSLIE, J.—With reference to the question of limitation I think that the Subordinate Judge is right.

For the purpose of determining that question it must be assumed that the allegations of title were true. The Subordinate Judge has found that the plaintiff and defendant were jointly in possession, and jointly realized rents from the tenants who squatted on the land before it became waste more than twelve years ago. So long as any profit was derivable from the land, they jointly had the benefit of it. When the land became waste, their joint ownership and possession were not in any way interfered with. It must be taken that their possession continued as before until something was done to alter the position of the parties in respect of each other. When one co-sharer sets up as against another adverse possession of land which had previously been waste, but at a former time had been occupied and had then been admittedly held jointly, it is for him to show that he has held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to them.

Now, even supposing the possession of the defendant to have been in its nature adverse, the Subordinate Judge has found on the evidence that it did not run far enough back to interfere with the right of the plaintiff to recover, so that he (plaintiff) must be presumed to have carried on the original possession during the time that the land lay wholly waste and unoccupied up to a period within twelve years of the institution of the suit.

The second ground of appeal, however, seems to be one to which effect must be given. It is that, whereas the plaintiff relies upon a title founded on a patni, created by an instrument in writing, it was not open to him to ask the Court to receive any evidence of the nature of the grant, except the writing itself, until the absence of that writing had been sufficiently accounted for.

The plaintiff has clearly not sufficiently accounted for the absence of the patni lease. He stated that he believed it to be in the hand of one of the defendants, and caused that person to be summoned to produce it. The defendant did not produce it, and stated that it was not with him. It does not appear on the record that the plaintiff took any sufficient steps to cause the document to be brought into Court if still in existence, nor is there any thing from which the Court might reasonably infer that the document is no longer in existence and incapable of being produced. Under

these circumstances, the question whether the plaintiff held under a patni lease or not cannot be determined on the oral evidence. It has been said that oral evidence of possession is sufficient to enable the plaintiff to recover, if the Court will infer from it the existence of his patni title. No doubt in some cases possession is taken to be evidence of an underlying but uncertain title; but in such cases possession must have run on up to the time of the alleged ouster from which the suit takes its origin. In this case active visible possession terminated many years ago, though within twelve years of the institution of the suit. For the purpose of the first issue—the issue of limitation on the assumption of the existence of a patni title—possession may be taken to have been continuing, throughout the time when the land lay waste, in those who actually enjoyed it when the land was formerly occupied; but, when we come to the question of title, there is no presumption at all that a title continues, or that the actual exercise of the rights conferred by it ceases otherwise than by forcible interruption. Unless the patni can be established, there is nothing to show that the possession of the plaintiff was founded on such a title as would give rise to the presumption on which the finding on the issue of limitation is based. He may have been holding under a title which terminated at the same time as the active enjoyment of the property came to an end.

Therefore, on the second ground, I think that the order of the Subordinate Judge must be reversed, and the judgment of the First Court affirmed. The appeal is allowed with costs.

PRINCIPLES OF THE INDIAN PENAL CODE.

[*As explained by the original framers and laid before the Governor-General in Council in the year* 1837.]

Note A. (Continued)

ON THE CHAPTER OF PUNISHMENTS.

**** The offender may be imprisoned, till the fine is paid; or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case the imprisonment is used in order to compel him to part with his money. In the latter case the imprisonment is a punishment substituted for another

punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life. And it is impossible for the best judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable, except the constant interference of some authority empowered to remit sentences: and such constant interference we should consider as in itself an evil. On the other hand to sentence an offender to fine, and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money, or lie in gaol, appears to us to be a very objectionable course. The high authority of Mr. Livingston is here against us. He allows the criminal, if sentenced to a fine exceeding one-fourth of his property, to compel the judge to commute the excess for imprisonment at the rate of one day of imprisonment for every two dollars of fine, and he adds that such imprisonment must in no case exceed ninety days. We regret that we cannot agree with him. The object of the penal law is to deter from offences, and this can only be done by means of inflictions disagreeable to offenders. The law ought not to inflict punishments unnecessarily severe. But it ought not, on the other hand, to call the offender into council with his judges, and to allow him an option between two punishments. In general the circumstance that he prefers one punishment raises a strong presumption that he ought to suffer the other. The circumstance that the love of money is a stronger passion in his mind than the love of personal liberty is, as far as it goes, a reason for our availing ourselves rather of his love of money than of his love of personal liberty for the purpose of restraining him from crime. To look out systematically for the most sensitive part of a man's mind, in order that we may not direct our penal sanctions towards that part of his mind, seems an injudicious policy.

We are far from thinking that the course which we propose is unexceptionable. But it appears to us to be less open to exception than any other which has occurred to us. We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature

of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which, by the Code, is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.

But we do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in his person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to those very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment would be most likely to restrain. We therefore propose that the imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine. But his property will for a time continue to be so. What we recommend is that, at any time during a certain limited period, the fine may be levied on his effects by distress. If the fine is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate, and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place.

It may perhaps appear to some persons harsh to imprison a man for non-payment of a fine, and after he has endured his imprisonment to take his property by distress in order to realize the fine. But this harshness is rather apparent than real. If the offender, having the means of paying the fine chooses rather to lie in prison than to part with his money, his case is the very case in which it is most desirable that the fine should be levied, and he is the very convict who has least claim to indulgence. The confinement which he has undergone may be regarded as no more than a reasonable punishment for his obstinate resistance to the due execution of his sentence. If the offender has not the means of paying the fine while he continues liable to it, he will be quit for his imprisonment. There remains another case, that of an offender who, being really unable to pay his fine, lies in prison for a term, and within six years after his sentence acquires property. This case is the only case in which

it can with any plausibility be maintained that the law, as we have framed it, would operate harshly. Even in this case, it is evident that our law will operate far less harshly than a law which should provide that an offender sentenced to a fine should be imprisoned till the fine should be paid. Under both laws imprisonment is inflicted, under both a fine is exacted. But the one law liberates the offender on payment of the fine, and also fixes a limit beyond which he cannot be detained in gaol whether the fine be paid or no. The other law keeps him in confinement till the money is actually paid. It is therefore at least as severe as ours on his property, and is immeasurably more severe on his person.

In fact we treat an offender who has been sentenced to fine more leniently than the law now treats a debtor either in England or in this country. By the English law an insolvent not in trade is kept in confinement till he has surrendered all his property; till he has answered interrogatories respecting it, till the Court is satisfied that he has paid all that he can pay. Even when his person is liberated his future acquisitions still continue to be liable to the claims of his creditors. The law throughout British India is in principle the same with the law of England. The offender who has been sentenced to fine must be considered as a debtor, and as a debtor not entitled to any peculiar lenity. It will be difficult to shew on what principles a creditor ought to be allowed to employ, for the purpose of recovering a debt from a person who is perhaps only unfortunate, a more stringent mode of procedure than that which the State employs for the purpose of realizing a fine from the property of a criminal. If a temporary imprisonment for debt ought not to cancel the claim of the private creditor, neither ought a temporary imprisonment in default of payment of a fine to cancel the claims of public justice.

It is undoubtedly easy to put cases in which this part of the law will operate more severely than we could wish; and so it is easy to put cases in which every penal Clause in the Code would operate more severely than we could wish. This is an evil inseparable from all legislation. General rules must be framed; and it is absolutely impossible to frame general rules which shall suit all particular cases. It is sufficient if the rule be, on the whole, more beneficial than any other general rule which can be suggested. Those particular cases in which a rule generally beneficial may operate too harshly must

be left to the merciful consideration of the Executive Government. We are satisfied that the punishment of fine would, under the arrangement which we propose, be found to be a most efficacious punishment in a large class of cases. We are satisfied that if offenders are allowed to choose between imprisonment and fine, fine will lose almost its whole efficacy, and will never be inflicted on those who dread it most.

Closely connected with these questions respecting the punishment of fine is another question of the highest importance, which indeed belongs rather to the law of civil rights and to the law of procedure than to the penal law, but respecting which we are desirous to place on record the opinion which we have formed after much reflection and discussion.

In a very large proportion of criminal cases there is good ground for a civil as well as for a penal proceeding. The English law, most erroneously in our opinion, allows no civil claim for reparation in cases where injury has been caused by an offence amounting to felony. Thus a person is entitled to reparation for what he has lost by petty fraud, but to none if he has been cheated by means of a forged bill of exchange. He is entitled to reparation if his coat has been torn; but to none if his house has been maliciously burned down. He is entitled to reparation for a slap on the face, but to none for having his nose maliciously slit, or his ears cut off. A woman is entitled to reparation for a breach of promise of marriage; but to none for a rape. To us it appears that of two sufferers he who has suffered the greater harm has, *cœteris paribus*, the stronger claim to compensation; and that of two offences that which produces the greater harm ought *cœteris paribus*, to be visited with the heavier punishment. Hence it follows that in general the strongest claims to compensations will be the claims of persons who have been injured by highly penal acts; and that to refuse reparation to all sufferers who have been injured by highly penal acts is to refuse reparation to that very class of sufferers who have the strongest claim to it.

We are decidedly of opinion that every person who is injured by an offence ought to be legally entitled to a compensation for the injury. That the offence is a very serious one, far from being a reason for thinking that he ought to have no compensation, is *prima*

facie a reason for thinking that the compensation ought to be very large.

Entertaining this opinion, we are desirous that the law of criminal procedure should be framed in such a manner as to facilitate the obtaining of reparation by the sufferer. We are inclined to think that an arrangement might be adopted under which one trial would do the work of two. We conceive that, in every case in which fine is part of the punishment of an offence, it ought to be competent to the tribunal which has tried the offender, acting under proper checks, to award the whole or part of the fine to the sufferer, provided that the sufferer signifies his willingness to receive what is so awarded in full satisfaction of his civil claim for reparation If the Criminal Court shall not make such an award, or if the sufferer shall not be satisfied with such an award, he must be left to his civil action. But if, in such an action, he recovers damages, the fine ought, in our opinion, to be employed, as far as the fine will go, in satisfying those damages.

The plan we propose would not be open to the strong and indeed unanswerable objections which Mr. Livingston has urged against the plan of blending a civil and criminal trial together. Yet we think it likely that our plan would in a great majority of cases render a civil proceeding unnecessary. We are happy to be able to quote the high authority of Mr. Livingston in favour of the doctrine that every fine imposed for an offence ought to be expended, as far as it will go, in paying any damages which may be due in consequence of injury caused by that offence.

This course seems to be the only course consistent with justice to either party. It is most unjust to the man who has been disabled by a wound, or ruined by a forgery, that the Government should take, under the name of fine, so large a portion of the offender's property as to leave nothing to the sufferer. In general, the greater the injury the greater ought to be the fine. On the other hand, the greater the injury the greater ought to be the compensation. If, therefore, the Government keeps whatever it can raise in the way of fine, it follows that the sufferer who has the greatest claim to compensation will be least likely to obtain it. By empowering the Courts to grant damages out of the fine, and by making the fine after it has reached the treasury of the Government answerable for the

damages which the sufferer may recover in a Civil Court, we avoid this injustice.

Nor is this arrangement required only by justice to the sufferer. It is also required by justice to the offender. However atrocious his crime may have been, he ought not to be subjected to any punishment beyond what the public interest demands. And we depart from this principle if, when a single payment would effect all that is required both in the way of punishment and in the way of reparation, we impose two distinct payments, the one by way of punishment and the other by way of reparation.

The principles on which a Court proceeds in imposing a fine are quite different from those on which it proceeds in assessing damages. A fine is meant to be painful to the person paying it. But civil damages are not meant to cause pain to the person who pays them. They are meant solely to compensate the plaintiff for evil suffered. They cause pain undoubtedly to the person who has to pay them. But this pain is merely incidental; nor ought the amount of damages at all to depend on the degree of depravity which the wrong-doer has shewn, except in so far as that depravity may have increased the evil endured by the sufferer. If A, by mere inadvertence, drives the pole of his carriage against Z's valuable horse, and thus kills the horse, A has committed an action infinitely less reprehensible than if he kills the horse by laying poison secretly in its food. The former act would probably not fall at all under the cognizance of the Criminal Courts. The latter act would be severely punished. But the payment to which Z has a civil claim is in both cases exactly the same, the value of the horse, and a compensation for any expense and inconvenience which the loss of the horse may have occasioned. That A has committed no offence is no reason for giving Z less than his full damages; that A has committed a most wicked and malignant offence is no reason for giving Z more than his full damages. If a mere inadvertence cause a great loss, the damages ought to be high. If the most atrocious crime cause a small loss, the damages ought to be low. They are fixed on a principle quite different from that according to which penal laws are framed and administered.

Here then are two payments required from one person on account of one transaction. The object of the one payment is to give him pain, and the amount of that payment must be supposed to be

sufficient to give him as much pain as it is desirable to inflict on him in that form. The object of the other payment is not at all to give pain to the payer, but solely to save another person from loss. It does, indeed, incidentally give pain to the payer; but it is not imposed for that end, nor is it proportioned to the degree in which it may be fit that the payer should suffer pain. Surely under such circumstances justice to the payer requires that the former payment should, as far as it will go, serve both purposes, and that if, in the very act of enduring punishment he can make reparation, he should be permitted to do so.

We have now said all that we at present think it necessary to say respecting the punishments provided in the Code. It may be fit that we should explain why some others are omitted.

We have thought it unnecessary to place incapacitation for office, or dismissal from office, in the list of punishments. It will always be in the power of the Government to dismiss from office and to exclude from office even persons against whom there is no legal evidence of guilt. It will always be in the power of the Government, by an act of grace, to admit to office even those who may have been dismissed. We therefore propose that the power of inflicting this penalty shall be left in form, as it must be left in reality, to the Government.

We also considered whether it would be advisable to place in the list of punishments the degrading public exhibition of an offender on a pillory after the English fashion, or on an ass in the manner usual in this country. We are decidedly of opinion that it is not advisable to inflict that species of punishment.

Of all punishments this is evidently the most unequal. It may be more severe than any punishment in the Code. It may be no punishment at all. If inflicted on a man who has quick sensibility it is generally more terrible than death itself. If inflicted on a hardened and impudent deliquent, who has often stood at the bar, and who has no character to lose, it is a punishment less serious than an hour of the treadmill. It derives all its terrors from the higher and better parts of the character of the sufferer: its severity is therefore in inverse proportion to the necessity for severity. An offender who, though he has been drawn into crime by temptation, has not yet wholly given himself up to wickedness and discarded all regard for reputation, is an offender with whom it is generally desirable to deal

gently. He may still be reclaimed. He may still become a valuable member of society. On the other hand the criminal for whom disgrace has no terrors, who dreads nothing but physical suffering, restraint, and privation, and who laughs at infamy, is the very criminal against whom the whole rigour of the law ought to be put forth. To employ a punishment which is more bitter than the bitterness of death to the man who has still some remains of virtuous and honorable feeling, and which is mere matter of jest to the utterly abandoned villain, appears to us most unreasonable.

If it were possible to devise a punishment which should give pain proportioned to the degree in which the offender was shameless, hard-hearted, and abandoned to vice, such a punishment would be the most effectual means of protecting society. On the other hand of all punishments the most absurd is that which produces pain proportioned to the degree in which the offender retains the sentiments of an honest man.

This argument proceeds on the supposition that the public exposure of the criminal has no other terrors than those which it derives from his sensibility to shame. The English pillory, indeed, had terrors of a very different kind. The offender was, even in our own time, given up with scarcely any protection to the utmost ferocity of the mob. Such a mode of punishment is, indeed, free from one objection which we have urged against simple exposure; for it is an object of terror to the most hardened criminal. But it is open to other objections so obvious that it is unnecessary to bring them to the notice of his Lordship in Council. That the amount of punishment should be determined, not by the law or by the tribunals, but by a throng of people accidentally congregated, among whom the most ignorant and brutal would always on such an occasion be the most forward, would be a disgrace to an age and country pretending to civilization. We take it for granted that the punishment which we are considering, if inflicted in any part of India subject to the British Government, would consist in degrading exposure and nothing more. That punishment, we repeat, while it would be a mere subject of mockery to shameless and abandoned delinquents, would, when inflicted on men who have filled respectable stations and borne respectable characters, be so cruel that it would become justly more odious to the public than the very offences which it was intended to repress.

We have not thought it desirable to place flogging in the list of punishments. If inflicted for atrocious crimes with a severity proportioned to the magnitude of those crimes, that punishment is open to the very serious objections which may be urged against all cruel punishments, and which are so well known that it is unnecessary for us to recapitulate them. When inflicted on men of mature age, particularly if they be of decent stations in life, it is a punishment of which the severity consists, to a great extent, in the disgrace which it causes; and, to that extent, the arguments which we have used against public exposure apply to flogging.

It has been represented to us by some functionaries in Bengal that the best mode of stimulating the lower officers of Police to the active discharge of their duties is by flogging, and that since the abolition of that punishment in this Presidency, the Magistrates of the lower provinces have found great difficulty in managing that class of persons.

This difficulty has not been experienced in any other part of India. We, therefore, cannot, without much stronger evidence than is now before us, believe that it is impracticable to make the Police Officers of the lower provinces efficient without resorting to corporal punishment. The objections to the old system are obvious. To inflict on a public servant who ought to respect himself and to be respected by others, an ignominious punishment which leaves an indelible mark, and to suffer him still to remain a public servant, to place a stigma on him which renders him an object of contempt to the mass of the population, and to continue to intrust him with any portion, however small, of the powers of Government, appears to us to be a course which nothing but the strongest necessity can justify.

The moderate flogging of young offenders for some petty offences is not open, at least in any serious degree, to the objections which we have stated. Flogging does not inflict on a boy that sort of ignominy which it causes to a grown man. Up to a certain age boys, even of the higher classes, are often corrected with stripes by their parents and guardians; and this circumstance takes away a considerable part of the disgrace of stripes inflicted on a boy by order of a Magistrate. In countries where a bad system of prison-discipline exists, the punishment of flogging has in such cases one great advantage over that of imprisonment. The young offender is not exposed even for a day to the contaminating influence of an ill

regulated gaol. It is our hope and belief, however, that the reforms which are now under consideration will prevent the gaols of India from exercising any such contaminating influence; and, if that should be the case, we are inclined to think that the effect of a few days passed in solitude or in hard and monotonous labor would be more salutary than that of stripes.

Being satisfied, therefore, that the punishment of flogging can be proper only in a few cases, and not being satisfied that it is necessary in any, we are unwilling to advise the Government to retrace its steps, and to re-establish throughout the British territories a practice which, by a policy unquestionably humane and by no means proved to have been injudicious, has recently been abolished through a large part of those territories.

The only remaining point connected with this Chapter to which we wish to call the attention of his Lordship in Council is the provision contained in Clause 61. This provision is intended to prevent an offender whose guilt is fully established from eluding punishment on the ground that the evidence does not enable the tribunals to pronounce with certainty under what penal provision his case falls.

Where the doubt is merely between an aggravated and mitigated form of the same offence, the difficulty will not be great. In such cases the offender ought always to be convicted of the minor offence. But the doubt may be between two offences neither of which is a mitigated form of the other. The doubt, for example, may lie between murder and the aiding of murder. It may be certain, for example, that either A or B murdered Z, and that whichever was the murderer was aided by the other in the commission of the murder. But which committed the murder, and which aided the commission, it may be impossible to ascertain. To suffer both to go unpunished, though it is certain that both are guilty of capital crimes, merely because it is doubtful under what Clause each of them is punishable, would be most unreasonable. It appears to us that a conviction in the alternative has this recommendation, that it is altogether free from fiction, that it is exactly consonant to the truth of the facts. If the Court find both A and B guilty of murder, or of aiding murder the Court affirms that which is not literally true: and in all occasions, but especially in judicial proceedings, there is a strong presumption in favor of literal truth. If the Court finds that A has either murdered Z or aided B to murder Z, and that B has either

murdered Z or aided A to murder Z, the Court finds that which is the literal truth; nor will there, under the rule which we have laid down, be the smallest difficulty in prescribing the punishment.

It is chiefly in cases where property has been fraudulently appropriated that the necessity for such a provision as that which we are considering will be felt. It will often be certain that there has been a fraudulent appropriation of property; and the only doubt will be whether this fraudulent appropriation was a theft or a criminal breach of trust. To allow the offender to escape unpunished on account of such a doubt would be absurd. To subject him to the punishment of theft, which is the higher of the two crimes between which the doubt lies, would be grossly unjust. The punishment to which he ought to be liable is evidently that of criminal breach of trust. But that a Court should convict an offender of a criminal breach of trust, when the opinion of the Court perhaps is that it is an even chance or more than an even chance that no trust was ever reposed in him, seems to us an objectionable mode of proceeding. We will not [illegible] stage of our labors, venture to lay it down as an unbending [illegible] the tribunals ought never to employ phrases which, [illegible] false, are conventionally true. Yet we are [illegible] presumption is always strongly in favor of [illegible] which accurately sets forth the real state of [illegible] we have supposed the real state of the [illegible] certainly committed either theft or [illegible] the Court does not know which. [illegible] to be the form of the [illegible]

[illegible] subject must, of course, be [illegible] the provision which directs he [illegible] to be calculated appears proper[illegible]

MANDAMUS—*defined.*

MANDAMUS is the name of a writ, issuing, in the Queen's name, from the court of Queen's Bench, directed to any person, corporation, or inferior court, requiring them to do some specified act which appertains to their office and duty. It is a high prerogative writ, of a most extensive remedial nature, and issues in all cases where a party has a right to have anything done, and has no *other legal means* of compelling its performance. A mandamus lies to compel the admission or restoration of t[illegible] applying to any office or franchise of a public nature, wheth[illegible] temporal; to academic degrees, to the use of a mee[illegible] for the production, inspection, and delivery [illegible] for the surrender of the regalia of a [illegible] corporate to affix their common seal; [illegible] court; and for an infinite number [illegible] of mandamus is exclusively confine[illegible] and has been called one of the *flow*[illegible] will lie to any other jurisdiction, [illegible] proper either in the granting [illegible] We have said that a mandamu[illegible] no other *legal remedy*. Thus, it d[illegible] ank of England to transfer sto[illegible] y by assumpsit; nor to insert [illegible] gh the omission is alleged to [illegible] otes for members of parliamen[illegible] andamus for licensing a public [illegible] the [illegible] of a barrister; nor t[illegible] o [illegible] person as student. [illegible] o adm[illegible] Nor for a fellow of [illegible]; nor [illegible] College of Phy[illegible] who [illegible] licensed in ord[illegible] the college [illegible] to restore a [illegible] meeting-h[illegible] if he had be[illegible] remedy [illegible] The 1 W. [illegible] prohibition [illegible] writs of [illegible] c. 126, a pla[illegible] action [illegible] ommа[illegible] defend[illegible] plaintiff is interested.—*Vide* [illegible]